Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

93-853

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MAINE

COUNSEL FOR PETITIONER
MARGARET S. ROWLAND

CARL R. NEIL
LINDSAY, HART, NEIL & WEIGLER
222 S.W. COLUMBIA ST.
SUITE 1600
PORTLAND, OREGON 97201
(503) 226-7677
COUNSEL OF RECORD

E. STEPHEN MURRAY, ESQ.
MURRAY, PLUMB & MURRAY
75 PEARL STREET
PORTLAND, MAINE 04101
(207) 773-5651

73pp

QUESTIONS PRESENTED

Petitioner Margaret Rowland is a medical doctor currently required by court order to live in Yarmouth, Maine in order to retain custody of her chidren. She remarried on June 14, 1992. Respondent, her former husband, obtained a court order on August 17, 1992, supplemented by a second order on November 19, 1992, providing that Petitioner will lose custody of her children if she moves to Oregon to live with her new husband.

1. Did the State of Maine deny due process of law to Petitioner by providing for an automatic transfer of custody to Respondent if Petitioner moves to Oregon, without any hearing or showing that such a transfer will be in the best interests of the children at the time of the transfer?

2. Did the State of Maine, acting *ex parte* on August 27, 1992, deny due process to Petitioner when it held her in contempt *in absentia* and summarily awarded exclusive custody to Respondent, on his *ex parte* application, without notice or hearing, after Doctor Rowland -- upon advice of counsel -- left to join her new husband in their new home in Oregon, resulting in summary seizure of the

children by police on a "writ of assistance" obtained *ex parte* in Oregon later the same day by Respondent?

3. Did the State of Maine deny Petitioner's constitutional rights of travel, marriage and familial privacy by restricting custody of her children to the village of Yarmouth, Maine, thereby forcing her to choose between residing with her new husband in Oregon without custody of her children or retaining custody of her children by continuing to reside in Yarmouth, Maine?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CASE BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENT 16

I. THE MAINE COURTS DENIED DUE PROCESS BY FAILING TO PROVIDE HEARINGS IN THEIR CUSTODY AND CONTEMPT ORDERS . . 16

A. The Custody Orders Should Have Required a Hearing Before Custody Could Be Taken from Petitioner and Transferred to Respondent 16

B. The Contempt Orders Should Not Have Been Entered Without Notice, Hearing and an Opportunity to Comply 24

1. Judge Cleaves' August Order 24

2. Judge Beaudoin's November Order . . 30

C. The Contempt Issues Are Not Moot 33

II. THE MAINE COURT ORDERS HAVE IMPERMISSIBLY BURDENED PETITIONER'S CONSTITUTIONAL RIGHTS OF TRAVEL, MARRIAGE, AND FAMILIAL PRIVACY, WITHOUT NEED OR JUSTIFICATION . 35

A. Petitioner's Rights of Marriage, Family and Travel Have Been Denied 35

B. There Is No Need or Justification for Restricting Petitioner To the Village of Yarmouth . . 42

1. The Orders Below Do Not Serve the Best Interests of the Children 42

2. Preferring A Visiting Father Over a Remarried, Custodial Mother Is Not Constitutionally Permissible 48

C. Petitioner's Marital Rights Arguments Were Fully Raised Below . . 54

CONCLUSION 58

APPENDIX A-1

TABLE OF AUTHORITIES

Austin v. United States,
___ U.S. ___, 113 S. Ct. 2801
(1993) 26

Baltimore City D.H.S. v. Bouknight,
493 U.S. 549
(1988) 19, 26

Bd. of Regents v. Roth,
408 U.S. 564 (1972) 19

Bell v. Burson,
402 U.S. 535 (1971) 17

Boddie v. Connecticut,
401 U.S. 371 (1971) 38

Bouie v. Columbia,
378 U.S. 347 (1964) 32

Boyd v. United States,
116 U.S. 616 (1886) 29

Brinkerhoff-Faris Trust v. Hill,
281 U.S. 673 (1930) 58

Brower v. County of Inyo,
489 U.S. 593, (1989) 29

Chrissy v. Mississippi DPW,
780 F. Supp. 1104
(S.D. Miss. 1941) 26

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) . . 17

Cox v. Louisiana,
379 U.S. 559 (1965) 33

D'Onofrio v. D'Onofrio,
365 A.2d 27 (N.J. 1976) 50

Day v. LeBlanc, 610 So. 2d 42
(Fla. D.C. App. 1993) 40

DeShaney v. Winnebago County,
489 U.S. 189 (1989) 18

Dobos v. Dobos,
431 S.E.2d 861 (N.C. 1993) . . . 40

Edwards v. California,
314 U.S. 160 (1941) 35

Fortin v. Fortin,
500 N.W.2d 229 (S.D. 1993) . . . 40

Fox Film v. Muller,
296 U.S. 207 (1935) 58

Fuentes v. Shevin,
407 U.S. 67 (1972) 25

Goldberg v. Kelly,
397 U.S. 254 (1969) 20

Griswold v. Connecticut,
381 U.S. 479 (1965) 34

Hemphill v. Hemphill,
572 N.Y.S.2d 689
(App. Div. 1991) 40

Hicks v. Feiock,
485 U.S. 624 (1988) 27

Hill v. Hill, 548 So. 2d 705
(Fla. Supp. 1989) 40

Illinois v. Krull,
480 U.S. 340 (1987) 29

In re Green,
369 U.S. 689 (1962) 27

In re Marriage of Miroballi,
589 N.E. 2d 565
(Ill. App. 1991) 50

In re Marriage of Pribble,
607 N.E.2d 349
(Ill. App. 1993) 40

In re Oliver,
333 U.S. 257 (1948) 27

James v. Kentucky,
466 U.S. 341 (1984) 58

Jaramillo v. Jaramillo,
823 P.2d 299 (N. Mex. 1991) . . . 59

Lambert v. California,
355 U.S. 225 (1957) 27, 32

Lane v. Schenck,
614 A.2d 786
(Vt. 1992) 40, 46, 56, 57

Lehr v. Robertson,
463 U.S. 248 (1983) 49

Long v. Long,
381 N.W.2d 350 (Wis. 1986) . . . 50

Loving v. Virginia,
388 U.S. 1 (1967) 36

Marriage of Branham,
617 N.E.2d 1317
(Ill. App. 1993) 40

Mathews v. Eldridge,
424 U.S. 319 (1977) 17, 20

May v. Anderson,
345 U.S. 528 (1977) 19, 28

McCoy v. Shaw,
277 U.S. 302 (1928) 58

Meyer v. Nebraska,
262 U.S. 390 (1923) 36

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 49

Michigan v. Long,
463 U.S. 1032 (1983) 58

Mize v. Mize,
621 So. 2d 417 (Fla. 1993) . . . 40

Moore v. City of East Cleveland,
431 U.S. 494, 499 (1977) 43

Murdock v. City of Memphis,
87 U.S. 590 (1875) 57

New Jersey v. TLO,
469 U.S. 325, 335 (1984) 29

Osteraas v. Osteraas,
859 P.2d 948 (Id. 1993) 39

Papachristou v. Jacksonville,
405 U.S. 156 (1972) 32

Perry v. Sinderman,
408 U.S. 593 (1972) 19

Planned Parenthood v. Casey,
505 U.S. ___, 112 S. Ct. 2791
(1993) 23, 32, 38, 52-54

Prince v. Massachusetts,
321 U.S. 158 (1944) 36, 44

Quilloin v. Walcott,
434 U.S. 246 (1978) 49

Reece v. Georgia,
350 U.S. 85 (1955) 58

Reynolds v. Reynolds,
433 S.E.2d 277 (W. Va. 1993) . . 46

Roe v. Wade,
410 U.S. 113 (1973) 34

Schwartz v. Schwartz,
812 P.2d 1268 (Nev. 1991) 50

Shapiro v. Thompson,
394 U.S. 618 (1969) 35

Sherbert v. Verner,
374 U.S. 398 (1963) 39

Smith v. Organization of Foster Families,
431 U.S. 816 (1977) 19

Smith v. Smith, 615 So. 2d 926
(La. Ct. of App. 1993) 40

Sniadach v. Family Finance,
395 U.S. 337 (1969) 25

Sosna v. Iowa,
419 U.S. 393 (1975) 34

Stanley v. Illinois,
405 U.S. 645
(1972) 17, 20, 36, 43

Staub v. Baxley,
355 U.S. 313 (1938) 58

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969) 58

Taylor v. Taylor,
849 S.W.2d 319
(Tenn. 1993) 39

Thompson v. City of Louisville,
362 U.S. 199 (1960) 26

United States v. Buena Vista,
___ U.S. ___, 113 S. Ct. 1126
(1993) 29

United States v. Verdugo-Urquidez,
494 U.S. 259 (1992) 29

Vitek v. Jones,
445 U.S. 480 (1978) 28, 34

Washington v. Harper,
494 U.S. 210 (1990) 28

Williams v. Pitney,
567 N.E.2d 894 (Mass. 1991) . . . 50

Wisconsin v. Constantineau,
400 U.S. 433 (1971) 34

Wisconsin v. Yoder,
406 U.S. 205 (1972) 36

Zablocki v. Redhail,
434 U.S. 374 (1978) 17, 36

Zamarippa v. Gesundheit,
529 N.E.2d 780
(Ill. App. 1988) 40

CASE BELOW

The decision and opinion below are reported at *Rowland v. Kingman*, 629 A.2d 613 (Me. 1993) and appear in Part I of the Appendix. A-31.

JURISDICTIONAL STATEMENT

The decision by the Court below was rendered on August 11, 1993; rehearing was denied September 9, 1993. A-53. This Petition is therefore timely within 90 days of the latter date, 28 U.S.C. § 2101; Sup. Ct. Rule 204. Jurisdiction in this Court rests upon 28 U.S.C. § 1257(3), since certiorari is being sought on the grounds that Petitioner's rights and privileges under the Constitution of the United States have been denied.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are as follows:

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For over a decade, Petitioner Margaret Rowland, M.D., has been a practicing family physician in Yarmouth, Maine. She and Respondent Kingman divorced in May 1991, after two children, Eddie and Meagan, and thirteen years of marriage. The children's "primary residence" was awarded to Petitioner; Respondent was awarded "reasonable visitation." There was no geographic restriction in the custody award. A-54.

In June of 1992 Doctor Rowland and Arthur LaFrance, a Professor of Law in Portland, Oregon, were married. In March of that year, Respondent Kingman filed a motion to have custody taken from Doctor Rowland upon learn-

ing of her marriage plans and the possibility that she might relocate to Oregon with the children if Professor LaFrance were unable to find suitable employment in Maine. In May, Professor LaFrance terminated his unsuccessful two-year job search. He and Doctor Rowland jointly purchased a home in Lake Oswego, Oregon, a Portland suburb, and she both secured employment as a family physician in the Portland area and started the process of terminating her medical practice of 12 years in Yarmouth, Maine. A-7, 23.

On August 17, 1992, Superior Court Judge Beaudoin entered an order denying Mr. Kingman's application to revoke Petitioner's custody. Judge Beaudoin also ordered, however, that

if Doctor Rowland moved to Oregon and Respondent then moved to Yarmouth from his farm house in Winslow, Maine, over fifty miles away, Respondent would get custody. Otherwise, custody remained with Petitioner. A-90.

Petitioner testified she would not move without her children. Upon advice of counsel, since Respondent Kingman neither had a residence in Yarmouth nor had indicated any plans to move there, Doctor Rowland moved, with the children, to her home and husband, and family practice in Oregon, on August 24, 1992. A-7, 103. In making this move, Doctor Rowland recognized, if Respondent Kingman subsequently relocated to Yarmouth, that she might have to return with the

children to Maine. Mr. Kingman, however, never notified Doctor Rowland of a move to Yarmouth. A-103.

Respondent applied on August 27 for an *ex parte* order of contempt, A-94, with the statement that Doctor Rowland would "further abscond" with the children and go into hiding if she or her attorneys were notified. This was done despite the fact that Professor LaFrance had called Respondent on August 25, told him where the children were, and invited him to call or visit. An order was issued on that day by Judge Cleaves of the Maine Superior Court, which held Doctor Rowland in contempt *in absentia*, summarily awarded sole custody and sole parental rights and responsibilities to Mr.

Kingman, ordered Doctor Rowland to deliver the children immediately to Mr. Kingman, and required that Doctor Rowland pay for all related expenses and attorney's fees. A-94. There was no hearing. No notice was given to Doctor Rowland or her attorneys, before or after the entry of Judge Cleaves' Order. Doctor Rowland was given no chance to return with the children to Maine.

Respondent flew to Oregon City, Oregon that same day with Judge Cleaves' order. At 4:30 p.m., Judge Sams of the Circuit Court there issued, *ex parte*, without notice, hearing or a chance to comply, a "Writ of Assistance" authorizing the use of "any force necessary" to seize the

children and to turn them directly over to Respondent. A-121. At 6:30 p.m., still on that same day, four police officers entered Doctor Rowland's home and forcibly seized the children, in tears and bathing suits. The children, without preparation or explanation, were immediately turned over to Respondent Kingman who flew with them through the night, through Seattle and Chicago, back to Maine. A-127.

Doctor Rowland was not notified of the location of her children and, despite help from friends and neighbors in Yarmouth, was unable to locate them for the next three days. Respondent knew that being with their mother and stepfather posed no risk to the

children. A-103. He knew of the excellent nature of the home, neighborhood and schools in Lake Oswego having just heard the testimony before Judge Beaudoin. He had been informed of the location and phone number of his children. *Id.* He knew that Professor LaFrance and Doctor Rowland, employed with a home in Oregon, and the children enrolled in school, would not "further abscond" with the children. He knew, also, that the start of school was two weeks away, leaving ample time for Doctor Rowland to comply with any order requiring that she and the children return to Maine. Importantly, on August 27, Mr. Kingman had not moved to Yarmouth, as the August 17 order required.

Doctor Rowland returned to Maine to try to find her children. Upon her arrival in Yarmouth, Doctor Rowland, with the help of her pastor, Reverend Ken Baily, found the children living with their father in a small apartment located over a garage on Main Street in Yarmouth's commercial district. This apartment, located approximately two miles from Petitioner's home, had not, at that point, ever been scrutinized by the court in terms of its suitabiality for the children.

Further proceedings took place before Judge Beaudoin in Maine. On November 19, 1992, after a contested hearing, he *again* returned custody to Doctor Rowland. This time, he ordered that if Doctor Rowland moves from Yar-

mouth, custody is to be transferred *immediately* to Respondent. A-132. The November order does not require a hearing to determine the best interests of the children at the time of taking custody from Petitioner.

Doctor Rowland testified throughout these proceedings that she would not move to Oregon if to do so meant losing custody of her children. A-7, 59. She offered Respondent Kingman an alternative visitation proposal that would afford him the same number of days with his children that he had currently enjoyed -- configured into longer blocks of time, on a less frequent basis. Doctor Rowland offered to pay for four round trip plane tickets for each child between Oregon and

Maine each year and offered to facilitate Respondent's visits to Oregon to see his children whenever he wished to do so. Petitioner's proposed relocation was not prompted by any desire to interfere with Respondent's relationship with the children.

It was at the later hearings that Judge Beadoin stated that what he had meant by his August 17 Order was that if Doctor Rowland were to relocate to Oregon, she should *first* turn the children over to their father in Winslow, *then* move to Oregon and wait to see if Mr. Kingman subsequently moved to Yarmouth with the children. A-132. If he did not move within a reasonable period of time, the children would be sent to live with Doctor Rowland in

Oregon. Earlier, the guardian ad litem had testified that Kingman's home was unacceptable and that both of Petitioner's homes were suitable residences for her family. A-59. Petitioner had testified she would not leave without the children.

In his November 19 ruling, Judge Beaudoin found that Doctor Rowland should have intuited his intent and, therefore, he affirmed Judge Cleaves' *ex parte* contempt order, held that Petitioner had deliberately misled her own attorneys into misadvising her, and ordered Doctor Rowland to pay thousands of dollars in costs and attorney's fees.

Constitutional arguments were presented to Judge Beaudoin, concern-

ing travel, marriage and due process. These were expanded and extensively presented to the Maine Supreme Court. That Court affirmed by a five-to-two vote. Justice Clifford, in dissent, joined by Justice Roberts, wrote (A-50-52):

> The Order results in requiring one of the parents to reside in Yarmouth, a location where, other than to be the primary physical custodian of the children, *neither* parent now wants to reside.
>
> * * *
>
> In my view, to require that a residence be maintained for the children in Yarmouth, when *neither* parent has any other reason to be there, wastes the parents' resources, contradicts common sense, and constitutes an abuse of discretion.

(Emphasis added.)

Petitioner and her children are confined to a single parent home in Yarmouth, over an hour from Respondent, the divorced father, and a continent away from their stepfather in Oregon, who lives alone in a home which awaits them today. The rationale is the "best interests of the children."

ARGUMENT

I. THE MAINE COURTS DENIED DUE PROCESS BY FAILING TO PROVIDE HEARINGS IN THEIR CUSTODY AND CONTEMPT ORDERS

A. The Custody Orders Should Have Required a Hearing Before Custody Could Be Taken from Petitioner and Transferred to Respondent

The Superior Court's November order, A-169, prospectively revokes Doctor Rowland's custody if she moves to her home, marriage and medical practice in Oregon. Her former husband, Respondent Kingman, automatically gets custody without having to show that he is, at that future time, either a fit parent or that he can offer the children a fit home. Despite the geographic restriction on Doctor Rowland, the November Order places no

similar restriction on Respondent. Under the terms of the Order, he may move the children anywhere. The Order does not provide an opportunity for Doctor Rowland to show that her home in Oregon would be (as, indeed, it now is) an excellent nurturing environment for her children. Nor is Respondent required to prove the opposite.

Such a present determination of future rights is either based on presumed facts, or is imposed regardless of facts. Either way, it denies due process. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Bell v. Burson*, 402 U.S. 535 (1971); *Mathews v. Eldridge*, 424 U.S. 319 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Zablocki v. Redhail*, 434

U.S. 374 (1978). It is as though a state were to determine today who should receive a medical license or lose a driver's license five years hence, on facts not now in existence. A hearing at that time is an unavoidable necessity.

Denying a hearing would be appropriate only if Doctor Rowland had no protectable, recognizable legal interest in the custody of her children. Indeed, the Maine Courts seem to feel this was the case, viewing Petitioner in purely instrumentalist terms -- as a person to cook, clean and care for the children, who should be viewed as state wards. But Doctor Rowland's children are *not* state wards. *Cf. DeShaney v. Winnebago County*, 489 U.S.

189 (1989); *Baltimore City D.H.S. v. Bouknight*, 493 U.S. 549 (1988).

Nor is Petitioner an employee or pensioner of the State. She is a parent, with the rights and responsibilities of custody. She has a legitimate expectancy, as a parent and caregiver, that her rights will not be taken away without a hearing. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *May v. Anderson*, 345 U.S. 528, 534 (1953).

These two aspects of the trial court's custody orders -- denying a hearing on future facts and dismissing Petitioner's interest -- combine to make an erroneous decision on custody

highly likely. Custody decisions require consideration of multiple factors, typically involving twelve or more statutory considerations. See Opinion below, n.3, A-26. Declaring that Doctor Rowland's custody will be terminated if a single factor (Doctor Rowland's move to Oregon) materializes, no matter when, ignores all other considerations, no matter how relevant. The Order of the Court below thus creates a high probability of error. Denying a hearing under such circumstances denies procedural due process. *Goldberg v. Kelly*, 397 U.S. 254 (1969); *Mathews v. Eldridge, supra*; *Stanley v. Illinois, supra*.

Quite apart from such procedural concerns, due process is implicated by

the crushing economic burdens imposed by the trial court. A-7. The Maine Supreme Court itself noted that Doctor Rowland closed her medical practice in order to move to Oregon. A-31. Since Petitioner must now travel between Maine and Oregon, it is not feasible to open a medical practice in either place. The trial court estimated her income at $35,000, less than half what it was before. Instead of one intact home in Oregon, the trial court has imposed upon the parties and children a scheme where Doctor Rowland has to be a single parent in Yarmouth, with a home in Oregon, and Respondent must maintain another home in Winslow, and an apartment in Yarmouth. The cost is additional tens of thousands of dollars.

Even if there had been a finding that the parties could afford this (and there was none), such a needless waste of resources (better set aside for college educations) simply cannot be justified. The failure to make such a finding denies both procedural and substantive due process. The dissenting Justices below observed that "to require that a residence be maintained for the children in Yarmouth, when neither parent has any other reason to reside there, wastes the parents' resources, contradicts common sense, and constitutes an abuse of discretion." A-52.

The substantive due process denial by the custody order involves not only economic interests but also Peti-

tioner's personal liberties of autonomy, marriage and familial privacy and association, developed more fully in Part II of this Petition. These liberties were extensively reviewed and affirmed by this Court in *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791, 2804-2809 (1993). A woman, such as Doctor Rowland, must remain free to choose the best course for herself and her children. This is a right guaranteed by due process of laws. A custody order which may, without hearing, deny these rights and terminate custody, denies due process.

B. The Contempt Orders Should Not Have Been Entered Without Notice, Hearing and an Opportunity to Comply

1. Judge Cleaves' August Order

The language of the August 17 Order provides that after Petitioner moved to Oregon, Respondent Kingman would get custody if he moved to Yarmouth within a reasonable time. A-90. He did not so move or notify Petitioner. A-7, 103. Instead, on August 27 Respondent proceeded ex parte before Judge Cleaves. Petitioner's rights were terminated *in absentia*. Custody and full parental rights and responsibilities were summarily transferred to Respondent. Petitioner was ordered to return the children, but given no chance to comply. A-94. Her children

were simply seized, as though they were automobiles or drugs in a narcotics raid. A-121.

The cases cited earlier stand for the central constitutional proposition that a hearing is of the essence of due process, indeed of civil liberties. No emergency existed to justify such extraordinary process. *Compare*, *Sniadach v. Family Finance*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Respondent knew where the children were and in fact had been invited to call or visit; there was no concern that the children were in danger; there had been ample testimony about the adequacy of the Oregon home; the start of school was two weeks away. A-59, 103. The actions of

Judge Cleaves were thus so superficial, excessive and unnecessary as to deny due process. *See Chrissy v. Mississippi DPW*, 780 F. Supp. 1104, 1126 (S.D. Miss. 1941).

It seems clear that Cleaves' objective was to punish Petitioner by using her children as pawns or hostages. Perhaps this is permissible where the children are wards of the court, *see Baltimore City D.H.S. v. Bouknight*, *supra*, but children should not be forfeited like so much contraband in a drug case. *Cf.*, *Austin v. United States*, ___ U.S. ___, 113 S. Ct. 2801 (1993). Perhaps summary contempt proceedings are appropriate for criminal contempt, but even in criminal cases, there must be evidence, see *Thompson*

v. City of Louisville, 362 U.S. 199 (1960), and an opportunity to comply, *Lambert v. California*, 355 U.S. 225 (1957). Both were denied to Doctor Rowland. Contempt, *ex parte* and *in absentia*, simply denies due process in the context of this case. *See Hicks v. Feiock*, 485 U.S. 624, 632-36 (1988); *In re Green*, 369 U.S. 689 (1962); *In re Oliver*, 333 U.S. 257 (1948).

Federal and state law both provide that the proper course for Respondent -- if he believed Doctor Rowland had improperly moved to Oregon -- was to enforce his Maine judgment there, under the federal Parental Kidnapping Act, 28 U.S.C.A. § 1738A, and the Uniform Child Custody Jurisdiction

Act, enacted in both Maine, 19 M.R.S.A. §§ 801 et seq. and Oregon, ORS §§ 109.700 et seq. Both require reasonable notice and a hearing, both also exclude punitive contempt orders. Petitioner, therefore, had a legitimate expectancy that her rights would be protected under the Constitution, in either Oregon or Maine, as a matter of due process. *See Washington v. Harper*, 494 U.S. 210 (1990); *Vitek v. Jones*, 445 U.S. 480 (1978); *May v. Anderson*, *supra*.

The issuance of the Writ of Assistance in Oregon illustrates why writs of assistance -- nowhere authorized by Oregon statute or court rule -- are attended by the notoriety and opprobrium accorded them through-

out history. A-7, 121. It was precisely such writs which led to the adoption of the Fourth Amendment. *See Boyd v. United States*, 116 U.S. 616, 625 (1886) and *United States v. Buena Vista*, ___ U.S. ___, 113 S. Ct. 1126, n.20 (1993); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266, 286 (1992); *Brower v. County of Inyo*, 489 U.S. 593, 595 (1989); *Illinois v. Krull*, 480 U.S. 340, 362 (1987); *New Jersey v. TLO*, 469 U.S. 325, 335 (1984). By ignoring the Fourth Amendment in Oregon, Respondent completed the denial of due process begun in Maine.

2. Judge Beaudoin's November Order

In November 1992, Judge Cleaves' contempt order was specifically affirmed -- after hearing -- by Judge Beaudoin. A-132. He then added his own. He stated that he had intended, by his earlier August 17 Order, that the children were to be turned over to Respondent Kingman in Winslow, Maine (a home that had been determined to be unfit for the children by the guardian ad litem), prior to any move by Petitioner to Oregon, even though his August Order had provided for a transfer "after" a move. Judge Beaudoin further asserted that Doctor Rowland should have been aware of this. He concluded, therefore, that she had

deliberately withheld information from and misled her attorneys, deceiving them into misadvising her that, under the terms of the August 17 Order, she could relocate to Oregon with the children as long as Respondent Kingman did not reside in Yarmouth. A-151.55.

Common sense is to the contrary. Petitioner did not flee Judge Beaudoin's Order; indeed, she did her best to obey Judge Beaudoin's Order, assuming he meant what he said. Instead, he simply later sought to write an order he had *not* written, prohibiting Petitioner from going, by claiming that is what the order said all along. But Judge Beaudoin is wrong. The plain language of his own order belies his effort at revisionism.

Due process cannot abide such a shell game. It requires that a statute or order give notice and guidance before a person, like Petitioner, may be held in violation. *Lambert v. California, supra.* As this Court said in *Casey, supra,* 112 S. Ct. at 2803, "Liberty finds no refuge in a jurisprudence of doubt." Citizens cannot be put at risk of arbitrary, punitive, and unpredictable applications of vague rules. *Papachristou v. Jacksonville,* 405 U.S. 156 (1972). Changing the rules retroactively denies due process. *Bouie v. Columbia,* 378 U.S. 347 (1964). A representative of the state may not say one thing, later claim he meant another, and impose the cost of his error or misadvice on the

citizen. *Cox v. Louisiana*, 379 U.S. 559 (1965).

Yet that is exactly what Judge Beaudoin did to Petitioner.

C. The Contempt Issues Are Not Moot

The Maine Supreme Court held that it would not review the lower Courts' findings of contempt. In passing, in footnote 3, A-31, the Court simply said that "since the contempt finding has no practical effect, the issue of its propriety is moot. . ."

The contempt findings were -- and remain -- of "practical" significance. They were the basis for a punitive transfer of custody, an invasion of Petitioner's home in Oregon, a seizure of her children and an assessment of

thousands of dollars in costs. Those findings continue to stigmatize Petitioner as a law breaker, acting in defiance of the law. *See Vitek v. Jones, supra; Wisconsin v. Constantineau*, 400 U.S. 433 (1971). They continue to have a profound impact on Petitioner Rowland's life and marriage. A-7. Such proceedings cannot now be deemed moot, otherwise denials of due process would remain "capable of repetition, yet evading review." *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Sosna v. Iowa*, 419 U.S. 393 (1975).

II. THE MAINE COURT ORDERS HAVE IMPERMISSIBLY BURDENED PETITIONER'S CONSTITUTIONAL RIGHTS OF TRAVEL, MARRIAGE, AND FAMILIAL PRIVACY, WITHOUT NEED OR JUSTIFICATION

A. Petitioner's Rights of Marriage, Family and Travel Have Been Denied

Petitioner seeks to travel from Maine to Oregon, to the home, family and life she has created there. The history of this nation was built by those who traveled West for a better life. *See Edwards v. California*, 314 U.S. 160 (1941). And the Constitution protects the fundamental right of travel. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Doctor Rowland has a constitutional right to marry, to create a new family and to enjoy the privacy of that familial association. This Court

has many times emphasized the constitutional status and importance of the family. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Traditionally -- and constitutionally -- family association is effected by the right to marry, itself an independent constitutional right. *Loving v. Virginia*, 388 U.S. 1 (1967). *See also Zablocki v. Redhail, supra.* This Court has also emphasized the primacy of the parent over the state in caring for children within a family. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These rights implicate and rely upon the central right to privacy, also --

and independently -- protected by the Constitution.

In *Planned Parenthood v. Casey*, 112 S. Ct. at 2807, this Court said that "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." The actions and orders of the Maine courts have dismembered Petitioner's family and forced her to choose between her husband and children. In the words of

this Court in *Casey*, "the power of the State" has thus reached "into the heart of the liberty protected by the Due Process Clause." 112 S. Ct. at 2819.

In 80% of divorce cases, custody is awarded to mothers. After a divorce, many women seek to improve their lives. A new family is one context for doing so, emotionally and financially, for themselves and their children. Divorce is an important step in this process; remarriage completes it. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). By restricting Petitioner to one small village in Maine, the Courts below have vastly curtailed Petitioner's opportunity to create and maintain her family.

The choices of women to marry and create families, like the choice of religion or speech or abortion, are constitutionally protected. *See Sherbert v. Verner*, 374 U.S. 398 (1963). Recent state court decisions have recognized the legitimacy of these choices, for both the mothers and their children, and refused to raise barriers in custody cases to interstate marriage and travel. They recognize that the constitutionally protected "family" is not the unit ended by divorce, but the new one, created by Doctor Rowland's second marriage. It is that family which needs protection, nurturing and respect. *See, e.g., Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993); *Osteraas v. Osteraas*,

849 P.2d 948 (Id. 1993); *Dobos v. Dobos*, 431 S.E.2d 861 (N.C. 1993); *Fortin v. Fortin*, 500 N.W.2d 229 (S.D. 1993); *Mize v. Mize*, 621 So 2d 417 (Fla. 1993); *Day v. LeBlanc*, 610 So. 2d 42 (Fla. D.C. App. 1993); *Marriage of Branham*, 617 N.E.2d 1317 (Ill. App. 1993); *In re Marriage of Pribble*, 607 N.E.2d 349 (Ill. App. 1993); *Smith v. Smith*, 615 So. 2d 926 (La. Ct. of App. 1993); *Lane v. Schenck*, 614 A.2d 786 (Vt. 1992); *Hemphill v. Hemphill*, 572 N.Y.S.2d 689 (App. Div. 1991); *Hill v. Hill*, 548 So. 2d 705 (Fla. Spp. 1989); *Zamarippa v. Gesundheit*, 529 N.E.2d 780 (Ill. App. 1988).

The cost of the lower Court's orders is not simply to marriage and

family. It is also to community. Petitioner, her husband and children must now maintain two homes and engage in transcontinental travel between them. A-7, 23. Continuity in the community -- church, service organizations, friendships -- for all of them must suffer. Petitioner cannot maintain her medical practice, because of protracted absences from Maine and Oregon, leading to a loss of her profession, for which she underwent years of training. Her husband and children must bear similar losses, not only within the several communities where they must now live, but also within the more central community which is their family. *Id.*

B. There Is No Need or Justification for Restricting Petitioner To the Village of Yarmouth

1. The Orders Below Do Not Serve the Best Interests of the Children

The best interests of the children have four times been found to be served by custody in Petitioner. Her home in Maine and her home in Oregon are excellent. A-59. Even after the November contempt order, custody remains with Petitioner. Yet Petitioner and her children are prohibited from living as an intact family in Oregon, in their home with Professor LaFrance.

A state may certainly protect the "best interests" of children. Such ends are legitimate, but the means must be constitutionally defensible.

Destruction of a marriage and an intact family do not qualify. As this Court said in *Stanley v. Illinois*, *supra* at 654, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents." In *Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977)*, this Court held that when a city attempted to restrict the right of a family to live together, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Stanley* and *Moore* recognized that a state must protect "the private realm of family life which the State

cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The Courts below simply disregarded Petitioner's rights to marry and to create an intact family for herself and her children. She had provided a good home in Yarmouth; she had created an equally good -- indeed, better home -- in Oregon. Judge Beaudoin simply overrode Doctor Rowland's choice and decided to keep the children in Yarmouth. Yet, as the dissents below noted, none of the adults caring for the children want to live in Yarmouth. Each would create a home elsewhere. Thus, Judge Beaudoin has elevated place above person, as though it is in the children's best interests

to disrupt and dislocate the lives of those who love them.

If the State of Maine were truly interested in the best interests of the children, it would provide incentives for parents to assume the burden of custody, not impose additional burdens. To serve as custodial parent, Petitioner must make significant sacrifices. She does so for love. It seems senseless -- indeed, cruel -- to require that she give up, as well, her freedom to marry and create a family for those whom she loves. It is doubly senseless to deprive the children of their new family, forcing them to live in a single-parent home. Far more rational is the policy, reflected in the state cases cited earlier, of

recognizing and protecting the new family, and deferring to the primary caretaker, enabling her to create a new family and home for herself and her children. *See Reynolds v. Reynolds*, 433 S.E.2d 277 (W. Va. 1993); *Lane v. Schenck*, *supra*.

The trial court emphasized that a move would be upsetting to one of the children, Eddie. He would be leaving the excellent home and community created for him by his mother. Yet the home in Oregon chosen by Doctor Rowland is equally excellent, as are the schools and friends who await Eddie there. The trial court seemed to conclude that the mere *fact* of change was harmful. Yet change -- even painful change -- is essential to growth

and opportunity. And, in a constitutional context, some upset *must* be tolerated if the rights to marry and travel are ever to be exercised and these children, like Doctor Rowland, are to be citizens of the nation and not simply a hamlet in Maine.

Perhaps the best evidence that the State is not truly concerned about the best interests of these children lies not in what the Judge said, but what the August and November Orders did. The Orders here did not say that when Doctor Rowland moves to Oregon, there will then be a hearing to determine the children's best interests. Rather, custody will be automatically transferred to Respondent -- regardless of the location or suitability of

his home or who lives with him. And regardless of the guardian's conclusion that Respondent's home in Winslow is unsuitable. A-59. *See also* A-7, 103.

The State, by automatically revoking custody, *in the future*, is simply preferring fathers to mothers and trying to keep children from leaving Maine. This it may not do.

2. Preferring A Visiting Father Over a Remarried, Custodial Mother Is Not Constitutionally Permissible

The rulings of the Courts below make the very exercise of constitutional rights -- the rights to travel and marry -- a basis for revoking custody. A statute in Maine declares that a proposed interstate move is "a

substantial change in circumstances," permitting a request for the courts to review custody. 19 M.R.S.A. § 752(12). The effect is to keep custodial mothers from moving away from divorced fathers. Judge Beaudoin preserved Respondent's schedule of frequent visitation by burdening Petitioner's rights of travel, marriage and family privacy. But this Court has three times held that the rights of biological fathers do not override the rights of custodial parents to familial privacy and association. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The Maine Courts ignored the obvious alternative of rearranging visitation for Respondent. *See* A-59, 132. The state appellate court opinions cited in Part II.A., supra, have found that protracted, less frequent, visitation is often preferable to the disruption, confusion and friction of more frequent visitation. *See also D'Onofrio v. D'Onofrio*, 365 A.2d 27 (N.J. 1976), widely cited for this proposition and *Schwartz v. Schwartz*, 812 P.2d 1268 (Nev. 1991); *Williams v. Pitney*, 567 N.E.2d 894 (Mass. 1991); *In re Marriage of Miroballi*, 589 N.E. 2d 565 (Ill. App. 1991); *Long v. Long*, 381 N.W.2d 350 (Wis. 1986). Allowing more stable visitation through longer blocks of time during school vacations

is a standard arrangement. Doctor Rowland offered to facilitate this, and indeed, to fund such an arrangement.

The Maine Courts also ignored the obvious alternative that Respondent could move to Oregon, to be near his children, rather than preventing Doctor Rowland from moving there to be with her husband, home, family and medical practice. No reason appears for preferring a divorced husband over a remarried mother. The Courts below would allow a divorced husband to refuse to exercise his constitutional right to travel and, in the bargain, insist that Petitioner must therefore give up hers. The orders and proceedings below have thus imposed this bur-

den upon Petitioner: before she may exercise her rights to travel, marry, pursue a medical practice, create an intact family for her children, she must get the permission of her former husband, Kingman.

In *Planned Parenthood v. Casey*, *supra*, 112 S. Ct. at 2828-2829, this Court held that a burden on freedom of choice becomes "undue" -- and hence unconstitutional -- when it deters women from exercising constitutionally protected choices. There, it was notifying a husband before seeking an abortion; here, the burden is turning children over to a *former* husband as a barrier to a new marriage. In either instance, the burden deters exercise of the right and denies due process.

Under *Casey's* analysis, Doctor Rowland could be required to respect Respondent's rights to notice and visit, 112 S. Ct. at 2830. But this Court emphasized that marriage is an association of individuals, and "The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses." And whatever recognition *Casey* may accord *present* husbands, surely less deference is due Respondent Kingman, a *former* spouse.

As in *Casey*, the Maine Court orders give Respondent an effective veto over Petitioner's right to choose whether to marry, and her right to create a family for herself, her chil-

dren and her husband. If Respondent had not brought suit, nothing would have happened. He would still have his right of reasonable visitation. He sought more. He sought dominion over his former wife. In *Casey*, 112 S. Ct. at 2831, this Court wrote, "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."

C. Petitioner's Marital Rights Arguments Were Fully Raised Below

The Maine Supreme Court entertained Doctor Rowland's constitutional arguments concerning her marital and privacy rights, but refused to pass upon them. In footnote 1, A-31, the Maine Supreme Court said the constitutional arguments "were not made before

the trial court", and therefore, Petitioner had not preserved them for review. This was never suggested during the oral argument, by the Justices or Respondent's counsel. Respondent Kingman had made no such claim in his Brief. Instead, he extensively challenged the merits of Petitioner's constitutional arguments. Those arguments occupied over 75 pages of her Briefs before the Maine Supreme Court.

These same arguments were submitted to the trial court during the hearings before Judge Beaudoin. Trial brief material during August, motion material during August and September, and memoranda material from September, all raised Petitioner's rights to marry and create a second family, prior

to Judge Beaudoin's November Superior Court Order, which was the basis of the Appeal to the Maine Supreme Court. From the outset, the court and the parties understood that a decision restricting custody would keep Petitioner from moving and exercising her rights to privacy and association in her marriage.

Judge Beaudoin several times demonstrated his understanding that this case involves fundamental issues of marriage, family, privacy and travel. His November Order, A-132, discusses the Vermont case of *Lane v. Schenk*, *supra*, which considered constitutional arguments by a relocating mother. 614 A.2d at 789-90. Judge Beaudoin disclaimed forcing Petitioner to make the

"Sophie's Choice" referred to (and avoided) in *Lane v. Schenck*. Significantly, the November Order specifically acknowledges "a parent's right to move and 'get on with her life ....'" A-132. Thus the trial court was well aware that it was ruling upon fundamental rights of marriage, family and travel; it simply chose to place the children in Yarmouth and award them to whichever parent moved there.

Still, the Maine Supreme Court, in a single footnote, passed over Petitioner's constitutional arguments. The Maine Supreme Court's singular footnote does not constitute an independent or adequate state bar to consideration of this Petition by this Court. *Compare Murdock v. City of*

Memphis, 87 U.S. 590 (1875) and *Fox Film v. Muller*, 296 U.S. 207 (1935), *with McCoy v. Shaw*, 277 U.S. 302 (1928); *Brinkerhoff-Faris Trust v. Hill*, 281 U.S. 673 (1930); *Staub v. Baxley*, 355 U.S. 313 (1938); *Reece v. Georgia*, 350 U.S. 85 (1955); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Michigan v. Long*, 463 U.S. 1032 (1983); and *James v. Kentucky*, 466 U.S. 341 (1984).

CONCLUSION

This is an important case. It concerns the autonomy of women, once awarded custody, to manage their lives without the destructive dominion of lawyers, courts, police and former husbands. It profoundly affects Doctor Rowland and her children, and

their right to live with Professor LaFrance as an intact family in their home in Oregon. It concerns the rights of hundreds, perhaps thousands, of women and children yearly.

Of the many state courts dealing with interstate marriages and families, few have dealt with the constitutional rights assuring marriage, family and travel. *See Jaramillo v. Jaramillo*, 823 P.2d 299 (N. Mex. 1991). It is then perhaps not surprising that the Court below would seek to evade Petitioner's constitutional arguments, preferring instead the unlimited latitude allowed by family law concepts. A constitutional decision by this Court is necessary to provide needed guidance to the States

and protection to citizens who -- like Petitioner and her children -- seek to exercise their constitutional rights to a new family and a better life.

The contempt issues in this case are integral to the marital and privacy issues. The arbitrary use of contempt powers by Judges Cleaves and Beaudoin, did not simply deny Petitioner's right to due process. The *ex parte* abuse of contempt powers, coupled with the mechanism of a Writ of Assistance, deprived this Petitioner of her right and responsibility to marry and to provide an intact family home for her children.

The question thus posed by this Petition is whether a custodial mother may remarry, and enjoy the privacy and

association of her family, for the benefit of herself, her children and her husband? Surely, in a federal union, under a Constitution that protects marriage and family, and the privacy and primacy of such associations, the answer must be yes. It could hardly be otherwise. Of all the civil rights and relationships protected by the Constitution, marriage and family are the most central; quite possibly, the most important.

Respectfully submitted,

Petitioner
Margaret S. Rowland,

by _____

Carl R. Neil
Lindsay, Hart, Neil & Weigler
222 S.W. Columbia Street
Suite 1600
Portland, Oregon 97201
(503) 226-7677
Counsel of Record

E. Steven Murray
Murray, Plumb & Murray
75 Pearl Street
Portland, Maine 04101
(207) 773-5651

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition have been served by mailing, postage prepaid, first class, to counsel of record in the court below, at the following address, on November ___, 1993.

Clarke Hambley, Esq.
Givertz, Lunt, Hambley & Scheffee
Ten Moulton Street
P.O. Box 4801
Portland, Maine 04112
(207) 772-8373

Carl R. Neil
Counsel for Petitioner

93-853

Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MAINE

APPENDIX OF PETITIONER
VOLUME 1

CARL R. NEIL
LINDSAY, HART, NEIL & WEIGLER
222 S.W. COLUMBIA
SUITE 1600
PORTLAND, OREGON 97201
(503) 226-7677
COUNSEL OF RECORD

E. STEPHEN MURRAY, ESQ.
MURRAY, PLUMB & MURRAY
75 PEARL STREET
PORTLAND, MAINE 04101
(207) 773-5651

APPENDIX

I. **SUPREME COURT OF MAINE** . . . A-1

MOTION FOR EXPEDITED BRIEFING, ROWLAND, MARCH 1993 . . A-1

ROWLAND AFFIDAVIT A-7

LaFRANCE AFFIDAVIT A-23

OPINION OF THE MAINE SUPREME COURT, AUGUST, 11, 1993 . A-31

ORDER DENYING RECONSIDERATION, SEPTEMBER 9, 1993 . A-53

II. **SUPERIOR COURT FOR CUMBERLAND COUNTY** A-54

DIVORCE JUDGMENT A-54

GUARDIAN'S REPORT (EXCERPTS), AUGUST 1992 . A-59

CUSTODY ORDER, BEAUDOIN, J., AUGUST 17, 1992 . . . . . A-90

CONTEMPT ORDER, CLEAVES, J., AUGUST 27, 1992 . . . . . A-94

MOTION TO VACATE AUGUST 27, 1992 ORDER, ROWLAND . . . A-103

MOTION FOR WRIT OF ASSISTANCE, KINGMAN, AUGUST 27, 1992 . . . . . A-121

ORDER AND WRIT, AUGUST 27, 1992 . . . . . A-127

FINDINGS, CONCLUSION AND ORDER, BEAUDOIN, J., NOV. 19, 1992 . . . . . A-132

NOTICE OF APPEAL, ROWLAND, DECEMBER 1992 . . . . . A-169

NOTICE OF APPEAL, KINGMAN, DECEMBER 1992 . . . . . A-171

I. SUPREME COURT OF MAINE

MOTION FOR EXPEDITED BRIEFING,
ROWLAND, MARCH 1993

STATE OF MAINE	SUPREME JUDICIAL COURT SITTING AS THE LAW COURT DOCKET NO. CUM-92-525

MARGARET S. ROWLAND,)
Plaintiff/)
Appellant)
)
v.)
)
ROBERT E. KINGMAN,)
Defendant/)
Appellee)

MOTION FOR EXPEDITED BRIEFING SCHEDULE

Pursuant to Maine Rule of Civil Procedure 75B(b), Plaintiff/Appellant Margaret S. Rowland hereby moves this Court to order an expedited briefing schedule in this matter. The grounds for this motion are as follows:

1. This action involves Plaintiff's appeal from an Order entered by the Superior Court on November 19, 1992 (Cumberland Co., *Beaudoin, J.*). That Order granted Plaintiff and her former husband shared parental rights and responsibilities for the couple's two children, Edwin (d.o.b. 1/13/83) and Meagan (d.o.b. 4/17/85) and gave Plaintiff primary physical custody of the children. The award to Plaintiff of primary physical custody of the children, however, was conditioned upon her promise to remain in Yarmouth, Maine.

2. As set forth in the Affidavit attached hereto as Exhibit A (Rowland) and B (LaFrance), the Plaintiff now

resides with the children in Yarmouth, Maine, is underemployed and the children have a single parent household; her husband lives and works in Portland, Oregon where he has been for ten years; her husband, despite a two year search, has been unable to find suitable employment in Maine in spite of his willingness to give up a tenured position and to take a significant cut in pay; the family life has deteriorated from what it once was and the persons affected by the lower court's decision are unable to effectively plan their lives until the Law Court decides this appeal.

3. In this appeal, Plaintiff seeks to have this Court vacate the Superior Court's Order restricting her

and the children to Yarmouth, Maine and to allow her to retain primary physical custody of her children even if she moves.

4. As set forth in the briefing schedule that is attached as Exhibit C, this matter is currently scheduled for argument during this Court's June Term. If a ruling by this Court or if on remand a ruling by the lower court is not issued until after the academic year begins in September 1993, it is possible that Plaintiff will be forced to remove her children from school in Yarmouth in the middle of the academic year, causing them unnecessary disruption.

WHEREFORE, Plaintiff/Appellant Margaret Rowland respectfully requests

that this Court issue an expedited briefing schedule in this appeal to allow the matter to be heard during either this Court's April or May Terms. Plaintiff proposes that she serve her brief on Defendant/Appellee Robert E. Kingman no later than March 3, 1993; that Defendant be required to serve his brief on plaintiff within 30 days or no later than April 2, 1993, without opportunity for extension; and that Plaintiff serve her reply brief on Defendant within 7 days of the service of Defendant's brief or no later than April 9, 1993.

Dated: March 2, 1993

/s/ E. Stephen Murray, Esq.

/s/ Ann M. Courtney, Esq.
Attorneys for Plaintiff/Appellant

MURRAY, PLUMB & MURRAY
75 Pearl Street
Portland, Maine 04101
(207) 773-5651

ROWLAND AFFIDAVIT

EXHIBIT A

STATE OF MAINE	SUPREME JUDICIAL COURT DOCKET NO. CUM-92-525

MARGARET S. ROWLAND,)
Plaintiff)
)
v.)
)
ROBERT E. KINGMAN,)
Defendant)

AFFIDAVIT OF
MARGARET S. ROWLAND, M.D.

I, Margaret S. Rowland, M.D., being duly sworn, depose and state as follows:

1. I am Margaret S. Rowland, M.D., the plaintiff in the above entitled case.

2. I currently reside at 41 Oakwood Drive, Yarmouth, Maine.

3. My husband, Professor Arthur B. LaFrance resides in our home in Lake Oswego, Oregon.

4. I am living in Yarmouth in compliance with Judge Beaudoin's order of November 19, 1992 to be able to maintain custody of my children, Edwin and Meagan Rowland Kingman.

5. Judge Beaudoin's Order has had a profound impact on my life in a number of different ways including financially and emotionally.

6. On June 14, 1992, Professor LaFrance and I were married. We had carefully planned and were looking forward to a life together with our children in Lake Oswego, Oregon:

a. We had purchased and jointly own a 10 room home in a

neighborhood of like homes in Lake Oswego;

b. I had an offer of part time employment from the Tigard Family Medical Group in Tigard, Oregon which offered a starting salary of $35,000 plus benefits and which would allow me to be at home with the children after school with no night call and limited weekend hours.

7. Even though I am legally married, one effect of Judge Beaudoin's Order is to effectively preclude a marriage. My primary relationship with my husband is, by necessity, through phone calls. I am able to visit with my husband only infrequently as schedules and finances

allow for periods of usually a week and rarely a month at a time. As a result, when he visits in our home in Yarmouth, his role there as husband and stepfather is unclear and poorly defined. The children and I must constantly adjust to his presence and, as that adjustment is being made, he must again leave. Not only is he unable to establish himself as a true member of our family, he is also unable to establish himself as a true member of the community and consequently, he and I are unable to establish ourselves as a couple in the community. Similarly, my presence in Oregon is one of slightly more than visitor. He and I do not have joint community involvement there, either.

8. I am a family physician and was actively in practice in Yarmouth as such for twelve years and had a large, well established practice.

9. I gave up my medical practice as of August 1, 1992 in anticipation of a move to Oregon. This required months of preparation and termination with my patients.

10. My medical practice is no longer available to me in Yarmouth. the group with which I practiced no longer has space available for me.

11. It is not possible, given the uncertain nature of my current circumstances, to reestablish a practice in Yarmouth. the large costs involved in terms of finding space, hiring office staff, buying medical

supplies and equipment and buying office equipment, require a minimum of a three to five year commitment to be financially feasible. Given the pending appeal in this case, it would not only be financially untenable but it would also be unfair and cruel to ask my patients to return to me if I cannot make a long term commitment to provide their medical care. My identity in this town, therefore, has been dramatically altered as has my identity in the greater medical community. My sense of community in Yarmouth no longer exists as it did previously.

12. I have managed to find employment as a consultant to Healthsource Maine, Inc. -- a

physician owned HMO insurance company. I do not have consistent office space available to me there and, consequently, no longer enjoy the normal interpersonal working relationships that I did previously. This is yet another aspect of the isolating impact of Judge Beaudoin's order.

13. The potentially tenuous nature of my presence in Yarmouth has impacted also at my church. I had been asked to be a member of the Trustees, yet when my legal situation was understood, that offer was withdrawn.

14. My life in Yarmouth, therefore, exists on a day to day basis, without the sense of forward

motion, with changed relationships with others in the town. My community here, as it was last year, no longer exists. My life here is much more isolated and isolating than it was previously.

15. There is a significant financial impact as a result of Judge Beaudoin's order. My income from my practice was approximately $85,000 annually. My children and I were, therefore, able to enjoy a comfortable life style. I am currently paid $30 an hour for the work I do as a consultant for Healthsource Maine. I do not receive any benefits. Since beginning work there, I have managed to earn an average of $770 weekly or an estimated taxable annual income of

approximately $36,900. As long as Judge beaudoin's order remains in effect, Professor LaFrance and I will be in the position of having to maintain two homes, with two mortgages and associated costs. We, to be able to see each other, must and will continue to incur substantial travel expenses. Our telephone bills are and will continue to be significant. Monies that had been earmarked for the children's future education are in jeopardy. I am no longer able to provide the same lifestyle or experiences for myself or my children. Skiing, new clothing, housecleaning and snowplowing services have, as but examples, been unaffordable expenses this year and will continue to be

unaffordable as long as Judge Beaudoin's order is in effect. Whereas I had reached a comfortable financial situation both for the present and the future, cost is now a daily concern. My ability to maintain this home and neighborhood for myself and my children is in jeopardy. Yet, Judge Beaudoin's order will not allow me to move from the town of Yarmouth without the almost certain loss of custody of my children.

16. There is significant emotional impact for myself and my children by being forced to remain in the "single parent" role. This impact is enhanced by the knowledge that I had created a viable, loving, two adult home situation for my children.

It is deeply painful to live with the knowledge that the Court has imposed a single parent home on Eddie and Meagan. They will, therefore, grow up with the knowledge of this as normal. They have been denied the experience of modeling provided by two loving adults sharing the same household -- the so-called "intact family" that has become so rare in our society. How can they be expected to be able to form loving, sustaining, adult relationships when they have been denied the opportunity to experience that as children? through its Order, the Court has also forced weekly, if not almost daily contact between myself and Mr. Kingman. This is an experience that I find extremely

stressful as the issues that led to our divorce remain largely unresolved. Though I try to keep the children as uninvolved in the animosities that exist as is possible, it is obvious that they are aware of them. I watch them go literally back and forth between us when we are present at public events, such as hockey games or Cub Scout Den meetings together. I can't believe that it is in their best interests to have to do so and it is chronically painful for me to watch this behavior.

17. Professor LaFrance and I have been married since last June. Prior to our marriage, we, and the children, would often focus our conversations on things we would plan

to do as a family, future goals that we had, trips we would take, and plans for our future together. He and I must now focus instead on ongoing legal battles. We don't know if there will be a future allowed us. I must choose between having a husband or having my children. I worry about whether or not my husband and I will ever be able to move beyond court battles and legal maneuverings or if the corrosive effects of this Order and its implications will leave us both financially and emotionally bankrupt. The long term survival of our marriage is in jeopardy as a result of the Order.

18. The Order has effectively imprisoned me without walls. I am

unable to move from this town, even though the community and financial stability that were once here for me no longer exist. I have a husband, yet am not allowed a marriage. My children have a stepfather, yet are denied an ongoing male presence in their home. I am unable to fully participate in my children's activities or in activities for myself both because of the uncertain nature of my future and because of my commitment to try to spend time with my husband.

19. I have been the primary parent -- emotionally, spiritually, and financially -- for Eddie and Meagan both during and since my marriage to their father. To live

within the terms of Judge Beaudoin's Order I am faced with an impossible choice. I can either choose to remain as the primary parent for my children or I can enjoy the freedoms that I never before questioned -- the freedom to marry and live with the man I love, the freedom to choose the community within which I shall live, the freedom to pursue the job of my choosing, the freedom to make my own decisions about my life. Since I cannot abandon my children, there is, in effect, no choice available to me.

Dated at Yarmouth, Maine this 10th day of February, 1993.

/s/ Margaret S. Rowland, M.D.

STATE OF MAINE
CUMBERLAND, ss. February 10, 1993

Personally appeared the above-named Margaret S. Rowland, M.D. and made oath that the foregoing statements by her are made on personal knowledge and are true.

/s/ E. Stephen Murray
Attorney at Law

LaFRANCE AFFIDAVIT

EXHIBIT B

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-92-525

MARGARET S. ROWLAND, M.D.
Plaintiff/Appellant

v.

ROBERT E. KINGMAN,
Defendant/Appellee

AFFIDAVIT OF ARTHUR B. LaFRANCE

I, Arthur B. LaFrance, hereby submit this affidavit in connection with the above-captioned proceeding:

1. I have lived and worked as a dean and tenured law professor in Lake Oswego since 1982, where I have strong ties to the community.

2. On June 14, 1992, after a courtship of nearly three years, about which Mr. Kingman knew, I married

Margaret Rowland in Yarmouth, Maine.

3. After an unsuccessful two year search to find employment in Maine, I, and my new wife, Margaret, concluded that we had no realistic choice but to live in Oregon where I could continue my employment and Margaret could work part-time and care for her children at all times when they were not in school.

4. To that end, Margaret and I bought a house in Lake Oswego, Oregon, Margaret secured a part-time job in the medical community, gave up her medical practice in Yarmouth, Maine and put her home in Yarmouth up for sale.

5. On August 17, 1992, and again on November 19, 1992, the Maine Court

concluded that Margaret and the children had to stay in Yarmouth, Maine presumably until Meagan, age 7, reaches age 18.

6. I now live alone in our ten room house, 3,000 miles from my wife and her children who are forced to live in a single parent home in Yarmouth, Maine, where I see them at uncertain intervals as my employment permits, with my arrivals and departures attended by the disruption of both their home and my own separate living requirements, leaving me unable effectively to maintain professional relationships, friends, church affiliations or recreation in conventional terms in either Oregon or Maine.

7. This has seriously disrupted my professional commitments and relations, impairing my performance as a law teacher, and causing me to withdraw from service as a part-time judge, from certain Bar Association commitments, from Law School Committees and responsibilities and from several scholarly commitments or academic deadlines, all of which require stability, continuity of presence, and continuous proximity to Law School resources for their success.

8. I now travel as often as I can to see my wife and her children, often at the expense of professional obligations at my law school, under scheduling which permits only short-

term visits and precludes long-range planning, leading to fatigue and disorientation.

9. Financially, the lower court's order has required creating two different households at an added expense of approximately $2,000 per month, and additional travel and communications of approximately $500 per month, at a time when my wife had closed her medical practice with a loss of income approximating $2,000 per month, for a total cost to us of approximately $50,000 per year, an amount which is destroying our savings, for present family purposes and for our children's future educations.

10. To this must be added the cost of legal fees totaling some $40,000 necessitated by the intrusive and confusing orders of the Court below, beginning with a divorce judgment which put no restrictions on my wife's custody of her children and followed by three subsequent orders which still do not provide the guidance needed to tell us when and where or if we may ever live as a family again.

11. I am not a wealthy man and have always provided for my family from my own earnings, but now I find I am having to borrow even to meet living expenses. The lower court order means I have little prospect of leaving any estate for my own three

children and grandchildren.

12. Emotionally, the lower court's order has meant that my stepchildren, my wife and I have lost the daily love, sharing and mutual support a family provides, replacing those bonds of affection with a sense of loneliness and injustice which is unremitting in its burden and extent -- and which may ultimately destroy our marriage.

13. To this is added the daily indignity of knowing that the trial court has granted to my wife's former husband greater contact with my wife than I have as her husband, and far greater control that I would even desire.

14. I have prepared and submitted this affidavit in response to request by counsel in furtherance of this appeal and do attest to the truth of its contents.

Dated: Feb. 23, 1993

/s/ Arthur B. LaFrance

STATE OF OREGON
COUNTY OF MULTNOMAH

Personally appeared before me the above-named Arthur B. LaFrance and made oath that the foregoing statements by him are made on personal knowledge and are true.

/s/ George H. Pike
Notary Public

OPINION OF THE MAINE SUPREME COURT, AUGUST, 11, 1993

Margaret S. ROWLAND
v.
Robert E. KINGMAN.

Supreme Judicial Court of Maine
Argued May 13, 1993.
Decided Aug. 11, 1993.

Ann M. Courtney, E. Stephen Murray (orally), Murray, Plumb & Murray, Portland, for plaintiff.

Clarke C. Hambley (orally), Elizabeth J. Scheffee, Givertz, Lunt, Hambley & Scheffee, Portland, for defendant.

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN and DANA, JJ.

GLASSMAN, Justice.

Both the plaintiff, Margaret S. Rowland, and the defendant, Robert E.

Kingman, appeal from a judgment entered in the Superior Court (Cumberland County, Beaudoin, J. (sitting in the Superior Court)), amending the provisions of their divorce judgment relating to the primary physical residence of and support for their two minor children. Finding no error in the record, we affirm the judgment.

The record reflects the following: On May 6, 1991, Rowland and Kingman obtained a divorce judgment providing that the primary physical residence of their two minor children, Edwin and Meagan, be with Rowland; that parental rights and responsibilities be shared by Rowland and Kingman; and that Kingman pay

child support to Rowland. Following the divorce, Rowland remained with the children at the family home in Yarmouth, where she maintained her medical practice, and Kingman moved to Winslow. Rowland subsequently remarried and began planning to move to Oregon where her husband was located. In March 1992, Kingman filed a motion to modify the divorce judgment to change the primary physical residence of the children to be with Kingman and to amend the child support provision should Rowland move to Oregon. In early August, pending a final hearing on Kingman's motion, there was a hearing before the court on the limited issue of whether the children would travel to Oregon with

Rowland on August 24, the date of Rowland's intended move. On August 17, the trial court issued an order providing that if Rowland moved to Oregon the primary physical residence of the children would shift to Kingman, on the condition that he reside in Yarmouth.

As a consequence of the August 17 order, Kingman located several potential homes in Yarmouth. Because Kingman wanted to know whether he should sign a lease, he asked Rowland directly about her plans to move to Oregon. Rowland replied that "if I need to stay in Maine to keep my children, I will." When Kingman later attempted to verify his next visitation period with the children,

Rowland did not inform him that because of the planned move the visit would be impossible. When Edwin asked Rowland if his father knew they were going to Oregon, Rowland replied that Kingman "knew of the plane tickets." Rowland took the children to Oregon on August 24. Kingman was advised of the move on the following day.

In response to Kingman's ex parte motion, the August 27 order of the trial court (Cleaves, J. (sitting int he Superior Court)) provided, inter alia, for the issuance of a writ of habeas corpus for the return of the children to Kingman and granted Kingman sole parental rights and responsibilities of the parties' children until further order of the

court. Kingman flew to Oregon and returned with the children to Yarmouth where he had rented an apartment.

In September 1992, the court held a hearing on all outstanding motions in this matter, including Kingman's original motion to modify the divorce judgment and Rowland's motions for findings of fact and conclusions of law regarding the August 17 order and reconsideration of that order, and her motion to vacate the August 27 order. By its order dated November 19, 1992, the trial court, inter alia, provided that the primary physical residence of the children be with Rowland if she resided in Yarmouth, but should Rowland move to Oregon the children's primary physical residence would be

with Kingman on the condition that Kingman reside in Yarmouth; that the parents have shared parental rights and responsibilities, except Kingman would have the sole right to determine day care issues for the children; and that Kingman's child support obligation be increased. It is from this judgment that the parties appeal.

Rowland first contends that the trial court committed an error of law in its determination relating to the best interests of the children by failing to afford an appropriate level of deference to her decision, as the parent with whom the children had their primary physical residence, that it was in the best interests of the children to reside with her in Oregon.

She argues that such parent should be permitted to decide where that parent and any minor children will reside, and that decision should be disregarded by the court only when it would present a clear danger to the children's well being. We disagree.[1]

By P.L. 1987, ch. 721, 19 M.R.S.A. § 752(12), amended by P.L. 1987, ch. 179, § 3, was repealed and replaced by the following provision:

---

[1] Rowland also argues that the judgment violated her constitutional rights to travel and marital privacy. Because these arguments were not made before the trial court, they are not cognizable on appeal. Morris v. Resolution Trust Corp., 622 A.2d 708, 712 n.2 (Me.1993).

The relocation, or intended relocation, of a child resident in this State to another state by a parent, when the other parent is a resident in this State and there exists an award of shared or allocated parental rights and responsibilities concerning the child, is a substantial change in circumstances.

See 19 M.R.S.A. § 752(12) (Supp.1992). It is not disputed that Rowland intended to relocate the children to Oregon. Pursuant to section 752(12) this intended relocation was a substantial change in circumstances that on a proper motion by either party warranted a review by the court of any previous arrangement of parental rights and responsibili-

ties with respect to a minor child. We have previously stated:

> [T]he question that the court must first consider on a motion to modify a custody arrangement is whether there "[h]as occurred since the prior custody order a change in circumstances sufficiently substantial in its effect upon the best interests of the children as to justify a modification of the custody arrangement."

Ehrlich v. Bloom, 585 A.2d 809, 812 (Me.1991) (quoting Villa v. Smith, 534 A.2d 1310, 1312 (Me.1987)), cert. denied, ___ U.S. ___, 112 S. Ct. 201, 116 L.Ed.2d 160 (1991).

Factors to be considered by the court in applying the standard of the

best interest of the child are set forth in section 752(5). The provisions of section 725(5) do not foreclose the court's consideration of either parent's decision relating to the residence of that parent and any minor child. However, we find nothing in the statutes governing parental rights and responsibilities with respect to a minor child of divorced parents, or in our case law to support Rowland's contention that the court should defer to the decision of that parent with whom the child has primary physical residence in determining the best interests of that minor child.[2]

---

[2] 19 M.R.S.A. § 752(5) (Supp.1992) provides:

> The court, in making an award of parental rights and

responsibilities with respect to a minor child, shall apply the standard of the best interest of the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community;

Rowland also contends that the trial court abused its discretion by ordering that the primary physical residence of the children be with

---

> H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
> I. The capacity of each parent to cooperate or to learn to cooperate in child care;
> J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
> K. The effect on the child if one parent has sole authority over the child's upbringing;
> K-1. The existence of a history of domestic abuse between the parents; and
> L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

Kingman if Rowland moved to Oregon. Here, the trial court found that Rowland's intended move to Oregon would constitute a change in circumstances substantially affecting the children's best interests. See Villa, 534 A.2d at 1312. Consequently, the court provided that the primary physical residence of the children would remain with Rowland if she remained in Yarmouth, however, should she move to Oregon the best interests of the children would be served by the children's primary physical residence being with Kingman on the condition that he reside with the children in Yarmouth. the court in its order specifically stated that because Rowland had testified several

times that it would not occur, the court did not address the issue of parental contact should Rowland move to Oregon.

In Boutin v. Dionne, 458 A.2d 426 (Me.1983), we stated:

> The legal principles [applicable in the appellate review of a custody arrangement] are well established and well known. In connection with both the original divorce judgment and later motions for change of custody, the sensitive questions relating to the upbringing of minor children of the divorced couple must of necessity be committed to the sound judgment of the trial judge who hears the witnesses who describe the relevant circumstances of the particular case.

Id. at 426. The trial court's "decision to modify a custody order will only be disturbed if the factual findings on which it is based are clearly erroneous or if it has abused its discretion crafting the new order." Ehrlich, 585 A.2d at 812.

The trial court had before it the following evidence: The children are currently well adjusted to their environment. They maintain frequent and positive contact with Kingman, who has actively sought a significant role as a caring and supportive father in their lives. They would suffer equally from being distant from either parent. Kingman is quite capable of performing as the custodial parent and is willing to do so in Yarmouth, where

the children would greatly benefit from the continuity of locale, routine, community, and schooling. Edwin, a particularly introverted child, is emotionally vulnerable to the disruption of his surroundings at this point in his development and would experience great difficulty in adjusting to a move to Oregon. The children expressed a meaningful desire to stay in Yarmouth. Furthermore, there was evidence before the court that Kingman is the parent better able to foster contact between the children and the other parent and resolve disputes with the other parent in an appropriate manner. Based on the record before us and the best interests considerations mandated in

19 M.R.S.A. § 752(5), we cannot say that the trial court's findings are clearly erroneous or that its amendment of the divorce judgment as it relates to the primary physical residence of the children constitutes an abuse of discretion.[3]

---

[3] Rowland also contends in her appeal that the finding of the trial court in its August 27, 1992 order that she was in contempt of its August 17 order for taking the children to Oregon was in error. This contempt finding had no independent practical effect; the trial court's August 27 order awarded Kingman expenses for bringing the children back to Maine and attorney fees. These awards are supportable without reference to the contempt finding. See 19 M.R.S.A. § 752(12) (court may employ any compulsory process it deems proper to enforce powers given under Title 19 "on which costs shall be taxed as in other actions"). By moving the children to Oregon, Rowland caused Kingman to incur the expenses of enforcing the court's August 17 order. An award to

Judgment affirmed.

WATHEN, C.J., and COLLINS, RUDMAN and DANA, JJ., concurring.

CLIFFORD, Justice, with whom ROBERTS, Justice, joins, dissenting.

Because the Court's decision places undue emphasis on the current residence of the children by requiring that their primary residence be in the Town of Yarmouth, a location where

---

Kingman of fees and expenses, in this context, is not an abuse of discretion. See Most v. Most, 477 A.2d 250, 263-64 (Me.1984) (divorce court has inherent powers to enforce its orders); Finn v. Finn, 534 A.2d 966, 968-69 (Me.1987) (trial court's award of fees and costs reviewable for abuse of discretion). Since the contempt finding has no practical effect, the issue of its propriety is moot, and we need not address it. Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A., 320 A.2d 247, 250 (Me.1974).

neither parent has a reason to reside, I respectfully dissent.

According to the Superior Court's order, the primary physical residence of the children is to be with Rowland, so long as she does not relocate to oregon. Rowland has remarried, her new husband lives in Oregon, and naturally Rowland would prefer to live there with him. The Superior Court's order goes on to provide that should Rowland move to Oregon, the children's primary physical residence is to be with Kingman, but only on the condition that he reside in Yarmouth. Kingman owns a home in Winslow. The order results in requiring one of the parents to reside in Yarmouth, a location where, other than to be the

primary physical custodian of the children, neither parent now wants to reside.

Although the current living arrangements of the children and how they adjust to changes in their home, schools, and community, are factors to be considered by the court in determining the best interests of the children, see 19 M.R.S.A. §§ 752(5)(D), (E) & (G) (Supp.1992), those factors must be considered together with all other relevant circumstances, and in the context of the reality of where the parents live and work. In my view, to require that a residence be maintained for the children in Yarmouth, when neither parent has any other reason to reside

there, wastes the parents' resources, contradicts common sense, and constitutes an abuse of discretion.

I would vacate the judgment and remand for the court to reconsider the primary physical residence of the children, along with the parental rights and responsibilities and rights of visitation, in the proper perspective of where the respective parents live and work.

ORDER DENYING RECONSIDERATION,
SEPTEMBER 9, 1993

STATE OF MAINE

SUPREME JUDICIAL COURT
Cumberland, ss. Law Docket
No. Cum-92-525

MARGARET S. ROWLAND,
Plaintiff/Appellant

v. ORDER

ROBERT E. KINGMAN,
Defendant/Appellee

Upon the motions of Appellant for reconsideration and for stay of the mandate, it is ORDERED that the motions be, and they hereby are DENIED.

The mandate shall issue forthwith.

Date: September 9, 1993

/s/ Caroline D. Glassen
Justice, Supreme Judicial Court

II. SUPERIOR COURT FOR CUMBERLAND COUNTY

DIVORCE JUDGMENT

STATE OF MAINE CUMBERLAND, ss. SUPERIOR COURT Civil Action Docket No. CV-89-1047

MARGARET S. ROWLAND, Plaintiff	)	
	)	DIVORCE
vs.	)	JUDGMENT
	)	
ROBERT E. KINGMAN, Defendant	)	

Notice of the pendency of the Complaint in this cause of divorce has been duly given according to law. This cause having been heard and the evidence fully presented and considered, a divorce from the bonds of matrimony is hereby ORDERED AND ADJUDGED between the parties on the Complaint of the Plaintiff for the

cause of irreconcilable differences. It is further ORDERED AND ADJUDGED that the parties shall have shared parental rights and responsibilities for their minor children, Edwin R. Kingman (D.O.B. 1/13/83) and Meagan R. Kingman (D.O.B. 4/17/85) whose primary residence shall be with the Plaintiff. The Defendant shall have the right to visit with and be visited by said minor children at such reasonable times as may be agreed upon by the parties in advance.

In accordance with 19 M.R.S. 316(6) the Court has made certain findings of fact concerning the current parental support obligation. Those findings are contained within the completed child support worksheet

which is attached hereto and incorporated herein.

The Defendant is ordered to pay to the Plaintiff the sum of $69.24 per week payable monthly ($300 per month) toward the support of the following children:

Edwin R. Kingman (D.O.B. 1/13/83)

Meagan R. Kingman (D.O.B. 4/17/85)

Further, that the Plaintiff shall be obligated to pay the remaining portion of the parental support obligation. The payments are to start on the first day of the first month following the date of this Divorce Judgment. The Court finds that the components of the parental support obligation are as follows:

Basic support entitlement	$310
Child care expenses	-0-
Extraordinary medical expenses	-0-

It is ORDERED that the support obligation for each child shall continue until that child graduates, withdraws or is expelled from secondary school as defined in Title 20-A, Section 1, or attains the age of 19 years, whichever first occurs after the child attains the age of 18 years.

The Court further ORDERS the Defendant to maintain health insurance for the benefit of the minor children if it is available through employment or at a reasonable cost. It is further ORDERED that nonrecurring extraordinary medical expenses for the children are to be shared in the

following manner: 70% by the Plaintiff and 30% by the Defendant.

The Conditional Withholding Order attached to this judgment is incorporated herein. It is further ORDERED that this judgment be noted upon the docket by incorporation by reference pursuant to M.R.Civ.P 79(1); further that the Settlement Agreement of the parties dated May 16, 1991 is incorporated herein.

Dated: 5/16/91 /s/ Roland Beaudoin
Justice
Superior Court

GUARDIAN'S REPORT (EXCERPTS),
AUGUST 1992

BRUCE B. KERR, Ph.D.
Clinical and Consulting Psychology
62 Portland Road
P.O. Box 805
Kennebunk, Maine 04043

Telephone
207-985-6675

Maine License 509
National Register 33529

August 10, 1992

The Honorable Roland Beaudoin
MAINE SUPERIOR COURT
Cumberland County Courthouse
142 Federal Street
Portland, Maine 04112

RE: **Rowland v. Kingman**
Docket Number: CV-89-1047

Your Honor:

As the record will reflect, I was appointed by the Court on 6/3/92 to serve as Guardian Ad Litem for Edwin and Meagan Kingman. In compliance with that Order, the following written information is provided to the Court

in order to assist the Court in determining the best interests of the children.

PROCEDURE:

In evaluating this case for the Court, multiple interviews were conducted with the children and each of their parents. In addition, information was collected from the daycare provider, the mother's new husband, the father's current partner, all of the children's primary school teachers, the primary school guidance counselor, the personal psychotherapists of each parent, the marital therapist seen by the parents prior to their marital separation, and several acquaintances of the parents and/or children.

FAMILY AND PARENTING HISTORY:

The parents reportedly met in 1976. The mother was then a medical student at the University of Cincinnati. The father was living in Massachusetts and working as a . . .

* * *

children's point of view is the continuity which is provided in terms of their relationship with their father and also their relationship with their home, school and peers. The largest disadvantage to the children of the current arrangements is that they reside primarily in a single parent household. Single parent households tend to be more stressful on both children and the residential parent, especially when

that parent is also working a busy schedule. The mother in this case has done a very good job in coping with the difficulties of this situation and has been greatly assisted by the identification and employment of a highly competent babysitter. Nonetheless, both the children and the mother do make comments which are consistent with the types of pressures and disadvantages which are common to a single parent home.

There is an issue in the current case as to whether or not the current living arrangements can be maintained. The mother has taken a number of steps in anticipation of relocating to Oregon including terminating her practice as a physician, and putting

the house on the market. If the Court were to determine that the children were to stay in Maine, and the mother chose to remain with the children, she would have to reconstitute some of the former living situation which has been dismantled in anticipation of the move. It is assumed, given the mother's professional credentials, that she would be able to find employment once again or restart a new practice, and as of the date of this report the house has not yet been sold. The mother has raised a number of concerns in this area, however, and thus it is not completely clear at this point in time as to whether the current arrangements can be maintained. The father has indicated

that he would be willing to relocate to Yarmouth if this would assist in maintaining the current arrangements.

Some minor changes in the current arrangement would be helpful if the current arrangements are to be maintained. The parents would benefit from better definition of boundaries and protocols and the children would benefit from the elimination of the 1.25 hour commute on school nights to and from their father's home in Winslow. The father has discussed obtaining an apartment in Yarmouth to use as a base for visitation and in the event that he did so there would be no objection to continuing these elements of the current arrangements. The only objection is the length of

commute imposed on a school night.

E. Stability of the proposed living arrangements

The mother's proposal is to move the children to Oregon where they will reside with herself and her new husband. This appears to be a stable plan. The mother has purchased a home in Oregon with her new husband. He is currently employed at a significant salary. The mother has obtained employment for herself on a part time basis as a contract physician. The step-father has lived in the Oregon community for approximately 10 years and therefore has roots in that community which can serve as a bridge for the children. The mother's move to Oregon does not appear to be

unplanned, blind or impulsive.

The mother's plan also anticipates that, because she will only work part time, she will be able to be home with the children during the majority of the times when they are not in school. This eliminates the need for any routine day care or babysitting. This is typically seen as a premium when there is a competent and caring parent. In the current case this may be somewhat less of a premium than usual because of the unusual quality of the day care arrangement created by these parents, but the mother's plan in Oregon does have the advantage of creating an at home parent for the children without inducing any significant financial

hardship as a result.

The proposed living arrangements in Oregon do suffer in that they impose upon the children a significant travel burden several times a year in order to fulfill their desire for physical contact with their other parent.

The proposed living arrangement that the children would remain in Yarmouth with the mother is, as noted above, somewhat in flux because of the mother's preparations to move to Oregon. Given her professional skills, however, it would appear reasonable for the Court to assume that she likely would be able to obtain employment once again in this area and once again support herself

and the children in the home community of Yarmouth. The primary negative element of this plan would be that the mother would once again be returned to the role of single parent. This is offset somewhat by the presence of the babysitter, but nonetheless does result in the continuation of a single parent home as the primary residential environment.

The proposed arrangement that the children would move to Winslow with their father does not appear to be a realistic option in this case given the mother's statement that she would remain in Maine if the children remain in Maine and the father's statement that under those circumstances he would agree that the children would

remain with their mother in Yarmouth as their primary residence. Setting this aside, the father does own a residence in Winslow and he is employed. The father's circumstances in Winslow do appear stable and he does appear to have the ability to provide a stable set of living arrangements for the children in that community.

Alternately, the father has discussed moving to Yarmouth in order to provide the children with a primary residence in that community. The father appears to have the ability to in fact obtain a residence but this plan appears to have the disadvantage of a lengthy commute for the father to and from his place of employment.

This might be offset to some degree by the ability to continue to employ the babysitter. The plans for residence with the father in Yarmouth are quite vague, however.

The overall data in the case suggests that either of these parents will be able to create a stable living arrangement for the children once the Court has determined the issues of custody and residence.

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance

The data in the case suggests no difficulties in the area of love, affection or guidance as regards either parent. These parents have significantly different styles and values, both as parents and as adults,

but both show a strong and genuine sense of love and affection for their children, and both appear to be well within the average range in their capacities to provide the children with appropriate guidance as they grow and develop.

The motivations underlying the desire to relocate in this case do not appear to be malicious, vengeful or impulsive. The mother and her new husband do appear to have made a genuine effort to attempt to remain in this area by having the husband relocate to Yarmouth. The primary obstacle in this appears to have been the inability of the new husband to obtain employment in this area. The information made available to the

Guardian suggests that a good faith effort to find employment was made, although the Court obviously must ultimately determine whether the efforts made were sufficient to qualify as good faith.

The reasons given for relocation in this case appear to revolve mostly around adult concerns and considerations such as a new marriage, desired employment and a desired life style. These arrangements do impact positively on the children in some ways, such as in the ability to have an at home parent, but the bulk of the motivations to relocate do not appear to involve issues that are inherent to the children, such as any special needs for medical care or education,

and appear to reflect mostly issues of changes of circumstance in post-divorce adult lives.

G. The children's adjustment to the children's present home, school and community.

The children's adjustment to their present home, school and community is currently good. This reflects well on the parents who have worked hard to create this positive adjustment. The children enjoy their community, their school and their friends. They report feeling secure and comfortable in their current environment and report no desire to leave.

This present positive adjustment was apparently particularly hard won for Eddie, who had significant

problems earlier in school. He appears now to have made the adjustment and to be doing significantly better. He is the child about whom there are the most concerns as to how he will be able to readjust if he is relocated. Eddie in general a relatively introverted and shy child. He tends to have a greater difficulty with change than the hypothetical average child whereas Meagan, his sister, appears to be more robust in this area and likely to have somewhat less difficulty with change than the hypothetical average child. This is not to state that Meagan might not have adjustment difficulties if relocated, particularly revolving around the loss of her father, but she

does appear to be constitutionally better equipped to cope with these difficulties than does Eddie.

H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent including physical access.

The children have been having ongoing visitation with their father since the marital separation. To the extent that occurrence is the best measure of capacity, the parents seem to have demonstrated capacity to this extent.

There is clearly friction around the area of visitation between these two parents. The mother tends to communicate concerns about what she views as the father's encroachment or intrusion and requests greater

definition of boundaries. The father's complaints revolve mostly around feeling a lack of access and flexibility on the part of the mother, although he now also has come to request greater definition of boundaries as well.

Some of this friction seen between the parents appears to reflect the typical residential versus visiting parent's views on the visitation situation. Typically residential parents are more likely to complain about issues of intrusion whereas visiting parents are more likely to voice complaints about lack of access. Some of the difficulty in this particular case also reflects continuing antipathy between the

adults as the conflicts which resulted in the end of this marriage still can be seen in the parents interactions with each other.

In general, however, both of these parents appear likely to obey whatever the Court Order is regarding visits and . . .

DISCUSSION AND RECOMMENDATIONS:

This case is rendered difficult for the Court by the fact that the children have very strong, positive, loving bonds with both parents and both parents reciprocate these. Both of these parents, despite their differences with each other, have genuine and substantial feelings for their children and a desire to remain involved in their lives.

After weighing all of the data in this case, the primary differentiating focus appears to resolve around the advantage to the children of having a two parent home in which the mother is largely available during those times when the children are not in school, versus having a set of living arrangements in which the children can have continuing and frequent physical access to the father. The living arrangements proposed by the mother in Oregon appear to be ones which would be stable and which would provide the children with a parent who would be available to them during the majority of non-school hours. This is clearly an asset to the children, notwithstanding the excellence of the

babysitting arrangement which they currently have in Yarmouth.

On the other hand, attaining this arrangement for the children would be at the cost of the comfortable, frequent and continuing access which they now have to their father, the imposition of a substantial travel burden onto the children, and the disruption of their current lives. Eddie and Meagan are basically accustomed to seeing each of their parents during any given week and do not routinely go more than several days without some type of physical contact with each parent. Relocation to Oregon would create a situation in which the children would regularly experience relatively long periods of

time without physical contact with one parent or the other and this would be a dramatic and undesired change for the children. The quality of the father's involvement in the children's lives would also change as he would be less available to understand and interact with the children's lives on an ongoing basis.

The weight of the information in this case indicates that the children gain the most and lose the least by a plan which would maintain their primary residence in their home community of Yarmouth with their mother and provide frequent and ongoing visitation with their father if this could be accomplished without losing the stability of the mother's

home. The successful relocation of the step-father to Yarmouth would preserve for the children the current arrangements which are working well for them and also eliminate the primary negative element of the current arrangements, i.e., the fact that the primary residence is a single parent household. It would also avoid the imposition of a travel burden on the children, and generally minimize the disruption of their lives as a result of their mother's new marriage.

The problem with this plan, however, is the unknown duration and level of the instability which would accompany the lack of employment of both the mother and step-father, given that the mother has closed her

practice in Maine in anticipation of moving and the step-father has been unsuccessful in his job search. Remaining in Maine would involve exchanging the stability offered by two jobs with a substantial combined income for immediate unemployment and uncertain future employment of each adult. The possible duration of unemployment for the adults is unknown and yet is a key factor in assessing the cost/benefit ratio to the children of staying verses going as the shorter the period of unemployment, the more acceptable this cost when compared to the long term changes for the children entailed in moving to Oregon. While the mother and step-father each has solid professional credentials and the

mother apparently has a population of patients who might return to her for medical care, her practice is closed, the step-father's job search in this area has been unsuccessful and the children would experience whatever period of financial instability which would occur until the adults secured employment. Further the mother's plan to work part time and be home with the children would, at best, be delayed.

Relocation by the new husband has apparently been seriously considered and pursued, although obviously whether sufficient attempts have been made in this area is for the Court to determine. Relocation by the new husband does not appear to have been impeded by the costs to him of leaving

his home, friends, community or current job. He appears to have been willing to bear each of these if acceptable employment could have been located here. The major impediment appears to be the desire not to move to Maine without any suitable employment, and without any way to be the primary wage-earner such that the mother could pursue a part-time work schedule which would leave her home with the children.1 Whether this is sufficient impediment is for the Court to decide, but it does appear to underlie the current request to relocate the children to Oregon which is before the Court.

Given the choice between the children living in Oregon with the

mother or Winslow with the father, the recommendation would be that the children be relocated to Oregon with the mother. This is made on the basis that either of these scenarios would involve uprooting the children from their home community and the only issue of continuity which distinguishes the two proposals would be the continuity with the mother as the primary residential parent. While the father is clearly capable of providing a primary residence for his children and acting in that regard, the continuity of the current arrangements would favor the children remaining with the mother as the primary custodial parent.

Given the option of the mother remaining in Yarmouth with the children versus the children moving to Winslow with the father, the data would again favor continuation of primary residence with the mother in Yarmouth, assuming the mother was able to find employment within a reasonable period. The relocation to Winslow would obviously disrupt the children's current community adjustment, as well as the continuity of their primary residence with the mother.

Relocation within Yarmouth to primary residence with the father, if the mother was still remaining in the community, would appear to unnecessarily disrupt the children's lives, assuming she was able to find

employment within a reasonable period.

The choice of relocating to Oregon with the mother versus remaining in Yarmouth with the father provides perhaps the most difficult choice for the Court in this case. This is the choice which squarely places the contest between the impact of losing the mother as the primary residential parent, versus the impact of losing an easily accessed relationship with the father and the current adjustment to home, school and community. The data on the father clearly suggests that he could perform in the role of primary residential parent and placement with the father in Yarmouth would have the added advantage of retaining the community

roots, but this question really is one with no clear answer as the loss to the children of the primary relationship with the mother would indeed be very difficult.

The option of Oregon with the mother versus Yarmouth with the father is also apparently a straw man as the mother has indicated that she would remain in Maine with the children if they were to stay in Yarmouth, thus rendering the effective pragmatic choice in this case that between relocation to Oregon with the mother versus remaining in Yarmouth with the mother, as discussed above.

SUGGESTED VISITATION ARRANGEMENTS:

In the event that the Court approves the relocation to Oregon, the

suggestion of the Guardian is that the children reside in Oregon with their mother during the school year and return to the father's home in Maine for the summer school holidays. The children should return to Oregon one week prior to the onset of school in order to . . .

93-853

Supreme Court, U.S.
FILED
NOV 26 1993
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

— V.

ROBERT E. KINGMAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MAINE

APPENDIX OF PETITIONER
VOLUME 2

CARL R. NEIL
LINDSAY, HART, NEIL & WEIGLER
222 S.W. COLUMBIA
SUITE 1600
PORTLAND, OREGON 97201
(503) 226-7677
COUNSEL OF RECORD

E. STEPHEN MURRAY, ESQ.
MURRAY, PLUMB & MURRAY
75 PEARL STREET
PORTLAND, MAINE 04101
(207) 773-5651

CUSTODY ORDER, BEAUDOIN, J.,
AUGUST 17, 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action
Docket
No. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

ORDER

Pending is Mr. Kingman's Motion for Post-Judgment Relief dated March 25, 1992. Hearings were held on August 6, 1992 and August 13-14, 1992. Both parties were present and represented by counsel.

If Mrs. Rowland relocates to the state of Oregon, it is in the best interests of Edwin and Meagan Kingman

that they primarily reside with Mr. Kingman in Yarmouth, Maine.

Therefore, it is **ORDERED** that the divorce judgment dated May 16, 1991 shall be amended to change the primary physical residence of the children to Mr. Kingman if Mrs. Rowland relocates to Oregon, and on condition that Mr. Kingman reside in Yarmouth, Maine. It is further **ORDERED** that primary physical residence for the children shall remain with Mrs. Rowland if she does not relocate to Oregon, or if Mr. Kingman does not move to Yarmouth as soon as is reasonably possible after Mrs. Rowland's relocation.

Further matters, including rights of parental contact, will be addressed in a subsequent order. That order

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Pursuant to Rule 79(a) of the Maine Rules of Civil Procedure, the Clerk is directed to enter this order on the Civil Docket by notation incorporating it by reference.

Dated: August 17, 1992

/s/ Roland Beaudoin
Justice, Superior Court

CONTEMPT ORDER, CLEAVES, J.,
AUGUST 27, 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Docket
No. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

ORDER

After hearing on Defendant's Ex Part Motion for Temporary Restraining Order, to Show Cause, for Contempt, Payment of Expenses, and Attorney's Fees, the Court FINDS, ORDERS and ADJUDGES as follows:

1. The Court finds that Plaintiff and her husband, Arthur LaFrance, have removed the parties' two minor children, Edwin and Meagan, to the State of Oregon. Further,

given the circumstances surrounding the removal of the children as related in Defendant's verified motion, Defendant and the parties' two minor children will suffer immediate and irreparable injury, loss or damage if Plaintiff or her attorney are notified of a hearing on the temporary restraining order. The immediate and irreparable harm includes:

a. Where Plaintiff removed the children to another state in contravention of a final order of this court; where she told the Defendant that she intended to remain in Maine, and then left the State; and where Plaintiff refuses to allow Defendant telephone contact with the children, there exists the likelihood that

Plaintiff will further abscond with the children, or conceal their location if notified of a hearing.

b. The children have been told that they will continue to attend their schools and reside in their community in Yarmouth, Maine. Their sudden move to Oregon will result in further confusion, sadness and anger for them.

c. Both the children and Defendant will suffer immediate and irreparable harm if their long standing routine schedule is not maintained, and they will lose the contact they would have enjoyed with each other, which is irreplaceable in time and quality.

2. The Court grants Defendant's request for an ex parte temporary restraining order, and sets the motion for preliminary injunction for Wednesday, September 9, 1992, at 9:00 a.m., at which time this order shall expire unless extended by the Court. Therefore, the Court enjoins Plaintiff from holding the children in the State of Oregon, and enjoins Plaintiff from withholding the children from Defendant or interfering with the children's return to Defendant's sole and exclusive physical custody in the State of Maine.

3. The Court finds Plaintiff in contempt of its August 17, 1992 Order.

4. The Court hereby amends the Divorce Judgment and its August 17,

1992 Order to grant Defendant *sole* parental rights and responsibilities of the parties' minor children, until further order of the Court.

5. The Court hereby allocates the children's primary residence to Defendant forthwith.

6. Plaintiff is ordered to turn over the children to Defendant forthwith, and to pay Defendant's and the children's hotel and travel expenses incurred to bring the children back to Maine, including all air fare for both he and the children, in the amount of $1,900.00. Execution to issue forthwith.

7. Plaintiff is ordered to pay to counsel for Defendant the sum of $1,190.00, which sum Defendant

incurred in the prosecution of this Motion. Execution to issue forthwith.

8. The Court hereby issues a writ of habeas corpus, requiring Plaintiff to return the children forthwith to the sole and exclusive physical custody of Defendant in Maine.

9. The Clerk is specifically directed pursuant to Rule 79(a) of the Maine Rules of Civil Procedure to enter this Order on the civil docket by notation incorporating it by reference.

Dated: August 27, 1992

/s/ Dana A. Cleaves
Justice, Superior Court

MOTION TO VACATE, ROWLAND
(EXCERPTS), AUGUST 31, 1992

STATE OF MAINE SUPERIOR COURT
CUMBERLAND, ss. Docket
No. CV-89-1047

MARGARET S. ROWLAND, Plaintiff	)	
vs.	)	ORDER TO SHOW CAUSE
ROBERT E. KINGMAN, Defendant	)	

Upon Motion of Defendant for an Order to Show Cause, it is hereby ORDERED pursuant to 14 M.R.S.A. Section 252 and M.R.Crim.P. 42, Plaintiff shall appear before the Cumberland County Superior Court, before the undersigned at 205 Newbury Street, Portland, Maine, on the 9th day of September, 1992 at 9:00 a.m. to show cause why she should not be held in contempt for her failure to comply

with the Order amending the parties' Divorce Judgment dated August 17, 1992, to wit:

1. Plaintiff's willful and malicious interference with the primary residential caretaking rights of Defendant by her refusal to permit the children any access to Defendant in accordance with the Order of August 17, 1992.

2. Plaintiff's ongoing and outrageous interference with the relationship between Defendant and the parties' minor children despite the shared parental rights and responsibilities accorded Defendant under the original Divorce Judgment, and the primary residential rights granted Defendant under the August 17,

1992 Order.

3. Plaintiff's malicious and calculated misrepresentation to Defendant of her intention to relocate to Oregon made for the purpose of deceiving him, so that she and Arthur LaFrance could remove the children to the State of Oregon, without Defendant's knowledge or consent, and despite the Court's contrary directive in its interim Order and the August 17, 1992 Order amending the parties' Divorce Judgment.

Dated: August 27, 1992

/s/ Dana A. Cleaves
Justice, Superior Court

MOTION TO VACATE AUGUST 27, 1992
ORDER, ROWLAND

STATE OF MAINE SUPERIOR COURT
CUMBERLAND, ss. Docket
No. CV-89-1047

MARGARET S. ROWLAND,)
Plaintiff)
)
vs.)
)
ROBERT E. KINGMAN,)
Defendant)

PLAINTIFF'S MOTION TO VACATE THIS COURT'S AUGUST 27, 1992 ORDER WITH INTEGRATED MEMORANDUM OF LAW

Plaintiff, Margaret S. Rowland, M.D., moves the Court to vacate its order of August 27, 1992.

FACTUAL BACKGROUND

On August 27, 1992, this Court issued an Order after hearing Defendant's ex parte motion for Temporary Restraining Order, to Show Cause for Contempt, and payment of

expenses and attorney fees. The Court found, in part, that the Plaintiff's removal of the parties' children from Maine to Oregon was in violation of this Court's August 17, 1992 Order. In fact, there was *no violation* of the August 17, 1992 Order and the August 27, 1992 should be immediately vacated. The August 17, 1992 Order should be reinstated, allowing the Plaintiff to reside with her children in Oregon unless and until the Defendant is found by this Court to have actually moved his residence from Winslow to Yarmouth, Maine, as ordered by this Court, that the residence is suitable and that a change in primary custodian from the mother to the father is found to be in the best

interests of the children.

ARGUMENT

Defendant's counsel, knowing that the undersigned had entered an appearance in this case, knowingly and willfully failed to notify counsel for Plaintiff concerning the Defendant's motion because of some misplaced, erroneous and/or trumped up belief that the undersigned would notify Plaintiff and that she would conceal the children's whereabouts from Defendant.

In fact, Judge Beaudoin's August 17, 1992 Order reads, in pertinent part, as follows:

> Therefore, it is **ORDERED** that the divorce judgment dated May 16, 1991 shall be amended to change the primary physical custody of

> the children to Mr. Kingman *if* Mrs. Rowland relocates to Oregon, *and on condition that Mr. Kingman reside in Yarmouth, Maine.* It is further **ORDERED** that primary physical residence for the children shall remain with Mrs. Rowland if she does not relocate to Oregon, *or if Mr. Kingman does not move to Yarmouth as soon as is reasonably possible after Dr. Rowland's relocation.*

(Emphasis added.)

This Order clearly states that the custodial parent changes *only* if Mr. Kingman relocates to Yarmouth within a reasonable time after Dr. Rowland moves to Oregon. This Court would then have the opportunity to determine whether this newly-established residence would be suitable for the children and whether it would be in their best interests to

live there. Until such time as Mr. Kingman *actually* sets up a home in Yarmouth and the Court determines that the home is a fit one for the children and that the best interests of the children are served by a change in custody, Dr. Rowland is in compliance with this Court's Order.

The Defendant's attorney's verified motion in support of their request for an ex parte order is riddled with false innuendo, misperceptions, misrepresentations and outright falsehoods. It is very difficult to understand how a court would, on this scanty presentation, allow an ex parte order modifying custody to issue.

A. *The Givertz verified*

motion alleges several "facts" that demand immediate rebuttal lest they taint subsequent proceedings in this court.

¶ 1. It is true that the parties have two minor children. Edwin and Meagan. these children have lived with their mother all of their young lives. It is true that this Court awarded shared parental rights and responsibilities as well as providing the Defendant with reasonable visitation rights.

¶ 2. The "facts" stated in ¶ 2 of the Givertz motion are just plain wrong. Defendant *did* have knowledge that the Plaintiff was planning to move to Oregon. Judge Beaudoin's August 17, 1992 Order even provides

for the possibility. Upon information and belief, Defendant was present and overheard a conversation between Dr. Rowland and her new husband that reaffirmed the date for which they had airline tickets for August 24, 1992.

¶ 4. Defendant has provided Dr. Rowland with no information concerning a residence he has found in Yarmouth. Until and unless Dr. Rowland is so informed, and the Court determines that this new residence is in the best interests of the children, she has the right to remain in Oregon with her new husband and her children. This Court cannot be led to believe that just any residence in Yarmouth would automatically be in the children's best interests and a hearing on any

new Yarmouth residence is essential.

¶ 9. Defendant never gave any notice to Dr. Rowland that a lease on a residence in Yarmouth was even a possibility, let alone an imminent event. Had Dr. Rowland known that the Defendant planned an immediate move, she would have reconsidered her options in light of the August 17 Order. The truth of the matter is that she relied on the fact that Defendant made no mention of moving to Yarmouth in finalizing her decision to move to Oregon.

¶ 10. Arthur LaFrance, Dr. Rowland's new husband, did in fact call the Defendant on Tuesday, August 25 from Oregon to inform him of the move. The quotation assigned to

Professor LaFrance in ¶ 10 of the Givertz motion was never uttered. Attached to this motion is a transcript of that phone conversation, which conversation was taped by Professor LaFrance. What Professor LaFrance *actually* stated concerning the time the children were to stay in Oregon is as follows:

> I'm calling to say that Margie, the kids and I arrived yesterday at Lake Oswego and we expect that we will be here until this custody thing is finally resolved.

There was no mention of an appeal. As the parties are well aware, Dr. Rowland has filed a Motion to Reconsider the August 17 Order. It is expected that the Court will hear that Motion and, at the very least,

clarify the intent of the order. However, it must be kept in mind that a removal of the children to Oregon *before* Defendant moved to Yarmouth was not prohibited!

¶ 12. To the time of the drafting of this Motion, despite a request in writing, Defendant has not advised the undersigned of the children's whereabouts or the whereabouts of his Yarmouth residence. Certainly if, as alleged, he "will be signing a lese on his Yarmouth residence," he should be able to provide the information concerning the location.

¶ 17. There is evidence in the record that Meagan, the parties' seven-year old daughter is drawing

pictures of adults having sex. It is suspected that this unauthorized sex education is taking place at the hands of the Defendant's live in girlfriend's two minor sons, Stephen and Ryan McKelvey. The allegation in ¶ 17 of the Givertz motion that the Guardian Ad Litem investigated this situation is correct. The Givertz motion, however, omitted any mention of the Guardian Ad Litem's Findings, to wit:

> Given the parameters of the current situation, the recommendation is made that once Meagan's location has been determined by the Court, she be entered into therapy with an appropriate therapist, who is skilled in this area and that the therapist attempt to establish a sufficient relationship with Meagan for her to discuss what the

> diary refers to. Until such time as that occurs, the father is advised to maintain a level of supervision when they are in his home which takes in to account this new information.

Report, page 14. The diary referred to includes a page upon which Meagan drew a picture of a man lying on top of a woman. There is a noticeable dark oval drawn in the genital area of the man. Meagan is seven years old! (A copy of the pertinent drawing is attached.) Given the Guardian Ad Litem's report that Stephen and Ryan McKelvey, the 10 and 12 year old sons of the Defendant's live-in girlfriend, be supervised, of course Dr. Rowland is concerned about the possible sexual abuse of her child!

¶ 20. The allegation that Dr. Rowland "has not permitted the children to speak with Defendant since their removal" is a lie. As noted in the attached transcript of the August 25, 1992 phone conversation between Arthur LaFrance and the Defendant, the Defendant was invited to call the children.

LaFrance: Do you want the phone number?

Kingman: Yes, I want the telephone number.

LaFrance: All right. 638-4913, area code 503. The kids would welcome a call from you --

Kingman: I'm sure they would Art.

LaFrance: Tomorrow night --

****

Kingman: The number, it's 503

638-4913?

LaFrance: That's correct.

Clearly there was an attempt to get the Defendant to call his children on Wednesday, August 27. Defendant did not call. Dr. Rowland and her children waited until mid-evening for a call, to no avail. It should be noted that the LaFrance/Rowland household has a telephone answering machine. At no time before the Defendant sent two or more hulking police officers to pull his children out of the house in Oregon, without benefit of packing any belongings, did Defendant try to contact the children. In addition, as shown in the transcript, Professor LaFrance did give Defendant their address in Lake

Oswego, Oregon.

The most unfortunate aspect of this case is the way in which the children were ripped from their mother's arms. In so stating this concern, it must be clear that Dr. Rowland's concern is for the children, not for herself. In the early evening of August 28, 1992, two Lake Oswego police officers arrived at the steps of Dr. Rowland's home, Court Order in hand, and demanded that Dr. Rowland give them the children. The Defendant waited on the sidewalk. The children knew only that the police had come for them and that they were not permitted to pack any of their belongings. They were marched away, crying, in their bathing suits. Defendant's assertion

that notice could not be given to Dr. Rowland or her attorneys because of a fear that she would hide the children is unfounded.

WHEREFORE, Plaintiff, Margaret S. Rowland, M.D., respectfully requests the Court to enter an order vacating its Order of August 27, 1992 and reinstating its Order of August 17, 1992.

In the alternative, Dr. Rowland respectfully requests this Court to issue an Order awarding shared parental rights and responsibilities with the children's primary residence to be with her in Yarmouth at her house, pending further resolution of this matter.

Dated: August 28, 1992

/s/ E. Stephen Murray

/s/ Ann M. Courtney
Counsel for Plaintiff

MURRAY, PLUMB & MURRAY
75 Pearl Street
Portland, Maine 04101
(207) 773-5651

MOTION FOR WRIT OF ASSISTANCE,
KINGMAN, AUGUST 27, 1992

IN THE CIRCUIT COURT OF THE STATE
OF OREGON
FOR THE COUNTY OF CLACKAMAS

Department of Domestic Relations

In the Matter of the Marriage of	)	
MARGARET S. ROWLAND,	)	No. 92 8 388
Plaintiff,	)	
vs.	)	MOTION FOR WRIT OF
ROBERT E. KINGMAN,	)	ASSISTANCE
Defendant.	)	

Defendant, Robert E. Kingman, by and through his attorney, Susana Alba, moves the court for an order directing that writ of assistance be issued to the sheriff of Clackamas County, Oregon, or any other sheriff or police in recovering the custody the minor

children of the marriage, Edwin Kingman, born January 1, 1983, and Meagan Kingman, born April 17, 1985.

Custody of Meagan and Edwin Kingman was awarded to Robert E. Kingman by order entered n August 27, 1992, by the Honorable Dana Cleaves, Justice Superior Court of the State of Maine for the County of Cumberland.

This motion is based on the affidavit of Robert Kingman, Defendant, attached.

DATED this 27 day of August, 1992.

HOEVET, SNYDER & MILLER, P.C.

/s/ Susana Alba, #89434
of Attorneys for Defendant

Affidavit of Robert Kingman

1. I am the Defendant in the action of *Margaret Rowland v. Robert Kingman*, currently pending in the State of Maine, Cumberland County Superior Court, at docket number 89-CV-1047.

2. I reside at 160A Main St. Yarmouth, Maine.

3. I was formerly married to Margaret Rowland, who resides, upon information and belief, at 7 Scarborough Drive, Lake Oswego, Oregon. She has remarried Arthur LaFrance, who resides at the same address.

4. I have two children, born during my marriage with Margaret Rowland, whose names and dates of birth are Edwin Kingman (date of birth: January

1, 1983) and Meagan Kingman (date of Birth: April 17, 1985).

5. On August 17, 1992, the Cumberland County Superior Court issued an order stating, in pertinent part, "The divorce judgment dated May 16, 1991 shall be amended to change the primary physical residence of the children to Mr. Kingman if Mrs. Rowland relocates to Oregon, and on the condition that Mr. Kingman resides in Yarmouth, Maine." Subsequently, the same court issued a temporary restraining order, inter *alia*, prohibiting Margaret Rowland from keeping the children from me. A copy of that order is attached.

6. The last time I saw my children was on August 22, 1992. I was

scheduled to visit with the children on August 26, 1992. I was contacted by Arthur LaFrance on August 25, 1992, however, who told me that he was in Lake Oswego with my children, and my former wife. He further stated that he would not be returning to Maine and that my children would remain in Oregon with him and my former wife until the appeal process was completed.

Dated at Portland, Maine this 27th day of August, 1992.

/s/ Robert Kingman

STATE OF MAINE
CUMBERLAND, SS. August 27, 1992

The above named Robert Kingman appeared before me and made oath that the facts represented in this affidavit are true to the best of his knowledge and belief.

/s/ Joan Kirby
Notary Public

ORDER AND WRIT, AUGUST 27, 1992

AFFIDAVIT, ORDER AND WRIT, SAMS, J., AUGUST 27, 1992 (OREGON)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

Department of Domestic Relations

In the Matter of the Marriage of	) No. 92 8 388
MARGARET S. ROWLAND, Plaintiff,	) ORDER GRANTING MOTION FOR WRIT OF ASSISTANCE
vs.	
ROBERT E. KINGMAN, Defendant.	

THIS MATTER came before the judge of this court on the motion and affidavit of Susana Alba, attorney for Robert E. Kingman, for an order directing a writ of assistance to be issued to the sheriff of Clackamas

County, Oregon, requesting the sheriff to assist the Defendant in recovering the custody of Meagan and Edwin Kingman, the minor children of this marriage. The court has considered the motion and affidavit filed and being fully advised, now makes this order.

IT IS HEREBY ORDERED that a writ of assistance be issued to the sheriff of Clackamas County, Oregon, directing the sheriff to assist Robert E. Kingman in recovering the custody of Meagan and Edwin Kingman, the minor children of this marriage.

DATED this 27th day of August, 1992.

/s/ Charles A. Sams
Circuit Court Judge

SUBMITTED BY:

Susana Alba, #89434
Of Attorneys for Defendant

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

Department of Domestic Relations

In the Matter of the Marriage of	)	No. 92 8 388
MARGARET S. ROWLAND,	)	WRIT OF
Plaintiff,	)	ASSISTANCE
vs.	)	
ROBERT E. KINGMAN,	)	
Defendant.	)	

TO: THE SHERIFF OF CLACKAMAS COUNTY, OREGON, OR ANY OTHER SHERIFF OR POLICE OFFICER IN OREGON.

GREETINGS:

In this cause, the Court judged that Edwin and Meagan Kingman are being unlawfully withheld by the Plaintiff, Margaret Rowland, and her husband, Arthur LaFrance, and that custody of the child has been awarded

to the Defendant, Robert E. Kingman.

By order of this court dated August 27, 1992, it is ordered that this writ of assistance issue to you.

THEREFORE, IN THE NAME OF THE STATE OF OREGON, you are commanded to proceed to 7 Scarborough Drive, Lake Oswego, Oregon, or wherever Edwin and Meagan Kingman, the minor children, may be found in the state of Oregon, and to take into custody as soon as possible Edwin and Meagan Kingman, and deliver the children to the Defendant, Robert Kingman.

You will use any force necessary to retrieve the children from any parties holding the children.

FINDINGS, CONCLUSION AND ORDER,
BEAUDOIN, J., NOV. 19, 1992

STATE OF MAINE CUMBERLAND, ss.	SUPERIOR COURT CIVIL ACTION DOCKET NO. CV-89-1047
MARGARET S. ROWLAND, Plaintiff vs. ROBERT E. KINGMAN, Defendant	)) FINDINGS OF) FACT,) CONCLUSIONS) OF LAW, AND) ORDER)

Pending is defendant's Motion for Post-Judgment Relief for Modification of Divorce Judgment dated March 25, 1992. Also pending are the following motions filed by plaintiff: Motion for Findings of Fact and Conclusions of Law dated August 21, 1992; Motion for Reconsideration dated August 27, 1992; and Motion to Vacate dated August 28, 1992. Hearings on these

motions were held on August 6, 1992, August 13-14, 1992, September 3-4, 1992, and September 9, 1992. Both parties were present and represented by counsel.

The parties entered into a consent order dated September 24, 1992 concerning parental contact while awaiting the Guardian ad Litem's recommendations. Recommendations were submitted by report dated October 13, 1992. The parties submitted proposed findings of fact and conclusions of law on October 26, 1992. The court was advised by letter dated November 5, 1992 that the parties had agreed to accept the Guardian ad Litem's recommendations concerning parental contact.

This court issued an order dated August 17, 1992. Another Justice issued an order dated August 27, 1992. This court made findings of fact and conclusions of law, and issued an oral order from the bench, on September 9, 1992. In addition, this court makes the following findings, conclusions, and orders.

The parties were married on June 3, 1978. Two children were born of the marriage: Edwin Rowland Kingman (d/o/b 1-13-83) and Meagan Rowland Kingman (d/o/b 4-17-85). The parties were divorced by judgment dated May 16, 1991, which incorporated an agreement of the parties. The divorce judgment provided that the parties would have shared parental rights and

responsibilities, that primary residence for the children would be with Dr. Rowland who resided in Yarmouth, Maine at the time, and that Mr. Kingman would have parental contact "at such reasonable times as may be agreed upon by the parties in advance."

The basic facts which outline the parties' backgrounds, marriage, birth of the children, separation, divorce, and parental contact arrangements are fairly and accurately contained at pages 1-3 of the guardian's report dated August 10, 1992, and admitted into evidence as defendant's exhibit # 2. Those basic facts are adopted by the court, incorporated herein, and need not be repeated.

In February, 1992, Dr. Rowland and the children traveled to Oregon where her present husband, Arthur LaFrance, resided. They toured the community and looked at schools and homes. Shortly after their return to Maine the children told Mr. Kingman about the trip. This was the first indication to Mr. Kingman of a possible move to Oregon. Dr. Rowland and Mr. LaFrance were married on June 14, 1992. Dr. Rowland closed her medical practice on July 31, 1992, after having informed her medical associates of her plans in April, 1992. Her home in Yarmouth, Maine was on the market for sale at the time of the first hearing on August 6, 1992. Mr. LaFrance and Dr. Rowland purchased

a house in Oregon sometime between February, 1992 and the first hearing on August 6, 1992. Dr. Rowland held a farewell party for the children Yarmouth on August 6, 1992, during the course of the proceedings in this case. Dr. Rowland made arrangements for a moving company to pick up her furniture in August, 1992, and had plane tickets for her and the children to Oregon for August 24, 1992. Dr. Rowland had negotiated and arranged part time employment as a doctor for a medical group in Oregon beginning in October, 1992.

19 M.R.S.A. Section 752(12) provides that the intended relocation of children resident in this State to another state by a parent is a

substantial change in circumstances. This provision was enacted in P.L. 1987, Chapter 179. The statement of fact attached to L.D. 1566, which was the presenting bill, states that "Under this new draft, the court must reassess the child's best interests where relocation of the child from the State has occurred or is intended."

Thus, the standard in this case is the "best interest of the child" standard set forth in 19 M.R.S.A. Section 752(5). Although Mr. Kingman has shown a substantial change in circumstances by evidence that Dr. Rowland intends to relocate to Oregon, he has the additional burden of proving that it is in his children's best interest that primary physical

residence for the children should be changed to him.

This burden, however, is evaluated under Section 752(5), and does not require him to satisfy any preliminary or threshold burden of showing, for example, that the intended relocation is motivated by malice or insufficient reasons. Likewise, Dr. Rowland need not satisfy any threshold burden such as may be required under so-called "anti-removal" statutes.

In its application of the best interest standard as set forth in Section 752(5) in a case such as this, the court must be mindful of the appropriate analysis. Dr. Rowland testified that she would not relocate

to Oregon if that was necessary for her to continue as the primary residential parent. Nevertheless, the court must consider her relocation to be inevitable, and the proper test is whether the children's best interests would be better served by a change in primary residence to their father in Maine while their mother resided in Oregon. See, *Lane v. Schenk, Jr.*, (No. 91-447, May 22, 1992, Vermont Supreme Court).

The test which the court applies is *not*, given that Dr. Rowland is willing to stay in Maine, is it in the best interests of her children to force her to remain in Maine. As part of its evaluation, the court must acknowledge a parent's right to move

and "get on with her life", and that a change in primary residence to the other parent would be a substantial event in the children's lives. Nevertheless, the standard remains the best interests of the children. Just as Dr. Rowland should not be faced with a "Sophie's choice" by the court applying an improper test, Mr. Kingman cannot be precluded from asserting that her intended relocation justifies a change in the primary residential parent.

Bruce Kerr, Ph.D., a licensed clinical psychologist, serves as guardian ad litem for the children in this case. His initial report dated August 10, 1992, and initial testimony on August 6, 1992, and August 13,

1992, were thorough, thoughtful, and insightful. The court agrees with his consideration of the facts in Section 752(5) set forth in his August 10, 1992 report and adopts it as its own with the following modification.

Prior to the decision of August 17, 1992, the court had a significantly greater concern than Dr. Kerr about Dr. Rowland's ability and willingness to cooperate with and include Mr. Kingman in an appropriate parental role with his children. This concern was based on the testimony of Dr. Kerr and the parties, and an evaluation of the parties' demeanor and credibility.

This concern was of further significance given the intended move to Oregon, with the obvious increase

in the potential for Dr. Rowland to minimize Mr. Kingman's role simply because of the physical distance between the parties. Therefore, although the suggested schedule for contact between Mr. Kingman and the children if they lived in Oregon appeared to be significant, the court was concerned that it would be minimized by Dr. Rowland at every opportunity. On the other hand, however, the court determined that Mr. Kingman would take the opposite approach, and would foster and encourage contact if the children remained in Maine with him.

After consideration of the factors set forth in Section 752(5), Dr. Kerr did not evaluate and weigh

those factors to determine whether it was in the children's best interests to remain in Maine with their father given that Dr. Rowland was relocating to Oregon. This is the court's ultimate obligation.

Recognizing the factors favoring a relocation to Oregon with Dr. Rowland, the court nevertheless determined that Edwin Rowland Kingman's personality and difficulty in adjusting to change, Edwin's developmental stage where contact with his father is more important now than at later stages, Mr. Kingman's significant involvement in his children's lives even though he was not the primary residential parent which would result in the same impact

on the children by separation from their father as would occur by separation from their mother, the benefits of continuity and stability in the Yarmouth community, the benefits of continued contact with Linda Attanas, the children's desire to remain in Yarmouth and the emotions resulting from a change even though the children do not fully comprehend the significance of their choice, Mr. Kingman's greater ability to foster and cooperate in allowing contact between the children and the other parent living a substantial distance away, and Mr. Kingman's greater willingness to resolve disputes in an appropriate manner all outweighed other factors and resulted in a

determination that it was in the children's best interest to remain in Yarmouth, Maine with Mr. Kingman should Dr. Rowland relocate to Oregon.

Cases such as this involving young children with loving parents who wish to make personal decisions often made without any court involvement are the most difficult for courts to address. There are factors pointing to and favoring the children's move to Oregon with their mother. Nevertheless, this court's exhaustive review of the evidence and evaluation of the factors set forth in Section 752(5) leads to the determination that the children would be better off in Yarmouth, Maine with their father than with their mother in Oregon.

Since Dr. Rowland did testify that she would remain in Maine if necessary to continue as primary residential parent, the court considered that possibility and determined that, essentially for continuity and stability, primary residence would then remain with Dr. Rowland. With such an eventuality, however, the court intended to restructure the parental contact of Mr. Kingman to remove travel to Winslow on Wednesday school nights, and to increase other periods of contact.

This case was originally set for hearing concerning defendant's motion for post-judgment relief for modification of divorce judgment

before another Justice on August 6, 1992. On that date the presiding Justice advised the parties that she could not hear the case because she knew the parties, and the parties advised the Justice that the hearing would take longer than the one day for which it was scheduled. At the suggestion of the presiding Justice, the parties agreed to postpone a full hearing on the motion until late September, 1992, but to present brief testimony to another Justice on the issue of whether the children would relocate temporarily to Oregon with Dr. Rowland as planned for August 24, 1992, pending a full hearing.

That issue was presented to this Justice on the morning of August 6,

1992. After hearing brief testimony from the parents, and testimony from the guardian ad litem that a temporary move to Oregon with the potential for a return to Maine would not be in the best interest of the children, this Justice did not rule on the narrow issue but rearranged the court schedule to accommodate a full hearing before the intended relocation date to prevent the potential of a temporary move. at the completion of the hearings on August 14, 1992, the parties agree with the court's determination that the matter should be taken under advisement over the weekend, that a summary decision should be issued on August 17, 1992, and that a detailed decision would

follow thereafter.

The court has stated on the record its rationale for the August 17, 1992, order. Dr. Rowland testified that she would remain in Maine if necessary to continue as the primary residential parent. There was evidence presented which persuaded the court that primary residence with Mr. Kingman would be in the children's best interest only if Mr. Kingman resided in Yarmouth, Maine, rather than his then current residence in Winslow, Maine. Mr. Kingman testified that he would relocate to Yarmouth if necessary to become the primary residential parent.

As a result of this testimony, and the procedural posture of the

case, it was appropriate, and beneficial to the children and parties, for the court to address these potential developments. The court's August 17, 1992, order, in the context of the evidence presented and the procedural circumstances of this case, clearly states that the children would reside in Yarmouth with Mr. Kingman if Dr. Rowland relocated to Oregon, that Mr. Kingman must move to Yarmouth within a reasonable time *after* Dr. Rowland relocates, but that if Dr. Rowland decided to remain in Maine the children would continue to reside with her. There is no indication in that order, especially given the circumstances of this case, that Dr. Rowland could relocate to

Oregon with the children before Mr. Kingman moved to Yarmouth, or that another hearing was necessary after he moved to determine the suitability of the residence. Dr. Rowland's attorney's statement that such an order makes no sense and is unworkable is absolutely correct. The order does not state or allow what Dr. Rowland's attorney asserts.

Dr. Rowland's actions subsequent to the August 17, 1992 order have been motivated by her personal interests, not the best interests of her children.

Dr. Rowland intentionally and knowingly took steps to surreptiously relocate to Oregon with the children. She provided deceptive answers to her

son and Mr. Kingman about her intentions. her testimony that she did not inform Mr. Kingman that she was leaving because she was concerned about "a scene at the airport" is only partially true. She knew that Mr. Kingman would disagree with her interpretation of the August 17 order, and she knew that Mr. Kingman could obtain an order preventing the children's departure had she been completely honest with him. Her testimony that several attorneys other than her current attorney's office advised her that the order permitted her to leave with the children is not credible. Her testimony that she did not tell the lawyers about the procedural posture of the case

essentially because she did not perceive it to be significant is not credible. Dr. Rowland was motivated to accomplish what she had felt was inevitable all along despite the August 17 order. Dr. Rowland intentionally violated the August 17 order, despite any advice from her lawyer who was not provided with critical information, and she is in contempt of court by her actions.

Even if this court were to make contrary findings concerning Dr. Rowland's motivation, the conclusion would be similar. Dr. Rowland conceded that she knew Mr. Kingman would have a different interpretation of the August 17 order, yet she chose to surreptitiously remove the children

from the state after deceiving her son and Mr. Kingman, rather than seek clarification of the order. This action alone reflects a significant lack of concern for her children's best interests.

Dr. Rowland and Mr. LaFrance flew to Lake Oswego, Oregon on August 24, 1992 without notice to Mr. Kingman. When her son had asked if his father knew they were leaving, Dr. Rowland responded that he knew they had plane tickets. When Mr. Kingman had asked if she was going to relocate to Oregon, Dr. Rowland replied that she would remain in Maine if necessary to continue as primary residential parent. These discussions took place after the August 17 order and before

the August 24 plane trip.

Mr. Kingman first became aware of the children's presence in Oregon by a phone call to him from Mr. LaFrance on August 25, 1992. Mr. Kingman then obtained an ex parte order from another Justice on August 27, 1992 ordering the children's return to Maine. Mr. Kingman flew to Oregon with the Maine court orders, obtained a writ of assistance from an Oregon court, and contacted the local Lake Oswego police. The police went to Dr. Rowland's home in Oregon on August 27, 1992, while Mr. Kingman remained outside, removed the children from the home, and returned them to Mr. Kingman. Mr. Kingman then immediately flew back to Maine.

Mr. Kingman obtained an apartment in Yarmouth as of August 26, 1992, and the children resided there with him until the agreed-to order of September 24, 1992. Dr. Rowland has also returned to Yarmouth, and testified again that she would remain in Yarmouth if necessary to continue as primary residential parent. Contact between the children and Dr. Rowland has gradually increased since their return to Maine.

The court has reconsidered its August 17 order pursuant to both the motion for findings of fact and conclusions of law and the motion to reconsider. Dr. Kerr's most recent testimony, and the other evidence presented does not alter this court's

findings and conclusions, but rather reinforces them.

The court seriously considered that it might be in the best interests of the children to primarily reside with Mr. Kingman in Yarmouth even if Dr. Rowland remains in Yarmouth. It is the court's determination, however, that, especially with recent events, the children are most in need of the continuity and stability that can be provided by residing in the home they have known with a somewhat similar pattern of parental contact as existed prior to August 17, if Dr. Rowland remains in Yarmouth. It is also the court's determination that increased parental contact with Mr. Kingman in addition to the contact prior to

August 17 is in the children's best interest, if Dr. Rowland remains in Yarmouth.

The parties have agreed to the parental contact schedule outlined in Dr. Kerr's report dated October 13, 1992. The court adopts those recommendations as findings and orders of this court and incorporates the report herein.

The court has not addressed the issue of parental contact with Dr. Rowland should she relocate to Oregon. She has testified several times that this will not occur. Should she relocate, the question of parental contact can be addressed at that time.

Mr. Kingman is employed and earns $27,000.00 per year. As of the last

hearing he owned a home in Winslow, Maine and rented an apartment in Yarmouth. Dr. Rowland was previously in private practice in Yarmouth earning approximately $81,000.00 per year. She had negotiated an arrangement with a medical group in Oregon to earn $35,000.00 per year for part time employment. She was unemployed in Maine at the time of the last hearing. She testified on August 14, 1992, that if she invested and made an effort, her patient base in Yarmouth would return over a short period [of] time. The court finds that Dr. Rowland has the ability to earn at least $35,000 per year in Oregon or Maine. A deviation from the child support guidelines amount is not

appropriate because both parties have increased and unique expenses resulting from this court's decisions.

Dr. Rowland's opinions about child care for her children are motivated by emotions of anger and disappointment at this time. It is in the best interests of the children that the right to determine child care be allocated to Mr. Kingman.

At the last hearing on September 9, 1992, a non-testimonial hearing, Dr. Rowland's attorney raised objections to portions of Dr. Kerr's prior testimony and requested that it be stricken from the record. The court concludes that these objections are waived because not timely made at the time of or during the hearing at

which Dr. Kerr's testimony was taken. Had the court sustained the objections and/or stricken the testimony at the hearings when the testimony was taken, Mr. Kingman's attorney would have had the opportunity to restructure the questioning and/or present other evidence. This opportunity was lost because of the delay in objecting.

Much of Mr. Kingman's attorney's services, and Dr. Kerr's services, since the August 17 order are the result of Dr. Rowland's intentional violation of the order. In addition to her ability to earn income, Dr. Rowland has other assets which provide her with an ability to pay attorney's fees and the guardian ad litem's fees. See, e.g., *Gray v. Gray*, 609 A.2d 694,

699 (Me. 1992).

Therefore, it is **ORDERED** that:

1. The divorce judgment dated May 16, 1991 is modified as set forth below. In all other respects, the judgment remains in full force and effect.

2. The court's order dated August 27, 1992 is modified to the extent contradicted below. In all other respects, the order remains in full force and effect.

3. This court's order dated August 17, 1992 remains in full force and effect as supplemented below.

4. If Dr. Rowland relocates to Oregon, primary physical residence for Edwin Rowland Kingman and Meagan Rowland Kingman shall be with Mr.

Kingman. Dr. Rowland shall notify Mr. Kingman in writing of her intention to relocate at least 14 days before the relocation. If Dr. Rowland relocates to Oregon, the parties may request a determination of rights of parental contact for Dr. Rowland with the children.

5. If Dr. Rowland remains in Yarmouth, Maine, primary physical residence for Edwin Rowland Kingman and Meagan Kingman shall be with Dr. Rowland. parental rights of contact shall be as set forth in Dr. Bruce Kerr's report dated October 13, 1992 which is incorporated herein. When the children are in the presence of Stephen and Ryan McKelvey, Mr. Kingman shall maintain a heightened level of

supervision, but not necessarily the constant, second-by-second presence of an adult.

6. Neither party shall remove the children from the state of Maine without 72 hours prior notice to the other party.

7. The parties shall have allocated parental rights and responsibilities whether Dr. Rowland resides in Oregon or Maine as follows: Mr. Kingman shall have the right to determine day care matters for the children; all other parental rights and responsibilities shall be shared.

8. If Dr. Rowland remains in Maine, the court has made certain findings of fact concerning child support on the attached child support

worksheet which is incorporated herein. Mr. Kingman shall pay child support to Dr. Rowland in the amount of $94.64 per week for the support of two children. The payments shall commence on November 20, 1992. In addition, Dr. Rowland shall pay 56% of any child care expenses for the children, and Mr. Kingman shall pay the remaining 44%. If Dr. Rowland relocates to Oregon, the court will re-compute child support.

9. Dr. Rowland shall be responsible for 77% of Dr. Bruce Kerr's bill for services up to and including August 13, 1992 because of her greater ability to pay, and Mr. Kingman shall be responsible for the remainder of the bill up to and

including August 13, 1992. Dr. Rowland shall be responsible for 95% of Dr. Kerr's bill from August 28, 1992 up to and including October 18, 1992 because of her greater ability to pay and because her actions generated the need for much of those services. Mr. Kingman shall be responsible for the remaining 5%. Dr. Rowland shall be responsible for 80% of Dr. Kerr's expenses up to October 18, 1992, and Mr. Kingman shall be responsible for the remaining 20%. Dr. Rowland shall receive a credit for the $5,000.00 she has already paid.

10. Dr. Rowland shall pay to Givertz, Lunt, Hambley & Scheffee the sum of $4,500 for services rendered to Mr. Kingman since the filing of

plaintiff's various motions.

Execution shall issue forthwith.

Pursuant to Rule 79(a) of the Maine Rules of Civil Procedure, the Clerk is directed to enter this order on the Civil Docket by notation incorporating it by reference.

Dated: November 19, 1992

/s/ Roland Beaudoin
Justice, Superior Court

NOTICE OF APPEAL, ROWLAND, DECEMBER 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET
NO. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

NOTICE OF APPEAL

Pursuant to Rule 73(b) of the Maine Rules of Civil Procedure, Plaintiff, Margaret S. Rowland, hereby appeals to the Maine Supreme Court from the Findings of Fact, Conclusions of Law and Order of Justice Roland Beaudoin in this action dated November 19, 1992.

Dated at Portland, Maine this 1st day of December, 1992.

/s/ Ann M. Courtney, Esq.
E. Stephen Murray, Esq.
Attorneys for Plaintiff

MURRAY, PLUMB & MURRAY
75 Pearl Street
Portland, Maine 04101
(207) 773-5651

NOTICE OF APPEAL, KINGMAN, DECEMBER 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION

DOCKET
NO. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

NOTICE OF APPEAL

Pursuant to Rule 73(b) of the Maine Rules of Civil Procedure, Defendant, Robert E. Kingman, hereby appeals to the Maine Supreme Judicial Court from the Findings of Fact, Conclusions of Law and Order of Justice Roland Beaudoin in this action dated November 19, 1992.

DATED at Portland, Maine, this

8th day of December, 1992.

/s/ Phyllis G. Givertz

/s/ Elizabeth J. Scheffee
Attorneys for Defendant

GIVERTZ, LUNT, HAMBLEY & SCHEFFEE
10 Moulton Street
P.O. Box 4801
Portland, ME 04112-4801

(4)

DEC 22 1993
OFFICE OF THE CLERK

NO. 93-853

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT

On Petition for Writ of Certiorari
to the Supreme Court of Maine

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR RESPONDENT
ROBERT E. KINGMAN

ELIZABETH J. SCHEFFEE
Counsel of Record
CLARKE C. HAMBLEY
GIVERTZ, LUNT, HAMBLEY & SCHEFFEE
10 MOULTON STREET, P.O. BOX 4801
PORTLAND, MAINE 04112-4801
(207) 772-8373

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Certiorari is sought to overturn a decision of the Supreme Judicial Court of the State of Maine, which upheld the trial court's custody decision as being in the best interests of the parties' two children, and which refused to pass on Petitioner's constitutional questions because she waived them. (Petitioner's Appendix, hereafter "P.App.", at 38, 48.)

1. Does this Court have certiorari jurisdiction where Petitioner failed to preserve her federal constitutional claims and where she does not now present important federal constitutional questions?

2. Were Petitioner's federal constitutional rights denied by application of Maine's constitutionally neutral custody statutes, or by ex parte interim process to

enforce its prior orders, which allowed her a subsequent full hearing on all issues?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 1

ARGUMENT 11

I. This Court Should Deny the Petition for Writ of Certiorari for Want of Jurisdiction 11

II. The Maine Supreme Judicial Court Did Not Deny Petitioner Due Process or Infringe Her Other Constitutional Rights 21

CONCLUSION 26

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Cases

Bailey v. Anderson,
326 U.S. 203 (1945) 12

Chicago, I. & L.R. Co. v. McGuire,
196 U.S. 128 (1905) 12

Crowell v. Randell,
10 Pet. 368 (1836) 11

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983) 12

Franz v. United States,
70 F.2d 582 (D.C. Cir. 1983) 15

Fuller v. Oregon, 417 U.S. 40 (1974) . 12

Jacobs v. Jacobs,
507 A.2d 596 (Me. 1986) 13n, 20

Layne and Bowler Corp. v. Western
Well Works, 261 U.S. 387 (1923) . . . 15

McGoldrick v. Compagnie Generale,
309 U.S. 430 (1940) 11

Morris v. Resolution Trust Corp.,
622 A.2d 708 (Me. 1993) 13

Myer v. Nebraska, 262 U.S. 390 (1923) . 15

Osier v. Osier,
410 A.2d 1027 (Me. 1980) 13n

TABLE OF AUTHORITIES
(cont'd)

Pierce v. Society of Sisters,
268 U.S. 510 (1924) 15

Rice v. Sioux City Cemetery,
349 U.S. 70 (1955) 15

Santosky v. Kramer,
455 U.S. 745 (1982) 16

Stanley v. Illinois,
405 U.S. 645 (1972) 20

Street v. New York,
394 U.S. 576 (1969) 12

Villa v. Smith, 534 A.2d 4310 (1988) . 20

Federal Statutes

28 U.S.C. § 1257(3) 11

Maine Statutes

19 M.R.S.A. § 752(2) 2n
19 M.R.S.A. § 752(5)(A)-(L) 5n, 17
19 M.R.S.A. § 752(12) 17n, 25

Oregon Statutes

O.R.S. 109.790 et seq. 7

Federal Rules of Procedure

Sup. Ct. R. 14.1(h) 12

TABLE OF AUTHORITIES
(cont'd)

Maine Rules of Procedure

M.R. Civ. P. 65 25

Treatises

Karst, Freedom of Intimate Association, 89 Yale L.J. 624 (1980) 15

NO. 93-853

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MAINE

JURISDICTIONAL STATEMENT

This Court has no certiorari jurisdiction to review this case. Petitioner did not timely present or otherwise preserve her constitutional claims. Furthermore, Petitioner's claims are not sufficiently important to warrant this Court's exercise of certiorari jurisdiction.

STATEMENT OF THE CASE[1]

Petitioner and Respondent separated in 1989 and divorced in May of 1991. Their divorce agreement and judgment required them to "share parental rights and responsibilities"[2] with respect to their two children, Edwin and Meagan. (P.App. 55.) Respondent was very involved in his children's lives; he saw his children on 200 days in each year since the parties' separation; was a Cub Scout leader and a sports coach; and regu-

---

[1] The Petition contains numerous misstatements about the factual underpinning and nature of the Maine decisions. This opposition clarifies those misstatements Respondent believes important to this Court's assessment, and adds critical facts Petitioner chose to omit.

[2] This phrase comes from Maine's statute and describes a joint parental decision-making arrangement. 19 M.R.S.A. § 752(2). (Respondent's Appendix, hereinafter "App." 17.) Petitioner did not, as her petition infers, have full custody of the Kingman children. (Passim.)

larly attended school-related and extra-curricular activities. His children felt loved and secure with him. (P.App. 73, 77, 79.)

In February 1992, Petitioner told the children that they were moving to Oregon. The children felt "sad and mad" about the Oregon move. They feared the loss of continuous and frequent contact with their father, as well as the loss of their important ties to the Yarmouth, Maine, community where they had lived all their lives and had enjoyed continuity of school, friends, and activities. (P.App. 145.) Because Respondent believed it would be better for his children to remain in Yarmouth, he filed a motion to change the children's primary physical residence to him in March 1992. He planned to move a relatively short distance

to Yarmouth to preserve his relationship with the children, and preserve their sense of community and belonging in the town and school system which assisted their successful post-divorce transition. (P.App. 87-88.)

After Respondent filed his motion, and before a hearing was held, Petitioner bought a house in Oregon, married an Oregon resident, placed her Maine residence on the market, closed her medical practice, bought non-refundable plane tickets for the final move, hired movers, and held a going-away party for the children. (P.App. 136.) Respondent's motion to change the children's residence was heard on August 6th, 13th, and 14th. At this hearing, both parties fully litigated the issue of whether the child-

ren's "best interests"[3] would be maximized by residing in Yarmouth, Maine, with their father, or by moving to Lake Oswego, Oregon, to live with their mother and new stepfather.

Respondent testified at length about his intentions to move to Yarmouth, about a home he planned to rent, and about his children's happy life in that community. Petitioner testified about her new home in Lake Oswego, and that she would not move to it if the court transferred the children's primary residence to Respondent. (P.App. 144-147.) At the end of trial, the parties agreed that the court would enter a prompt short decision and render a more complete

---

[3] Maine courts are required to review parental rights and responsibilities orders by determining the children's best interests. 19 M.R.S.A. § 752(5). (App. 20.)

decision after trial justice Beaudoin's vacation. His August 17th order transferred primary residence of the children to Respondent when Petitioner moved to Oregon. (P.App. 90-91.)

Petitioner decided to take the children with her to Oregon, anyway. She then engaged in a series of deliberate fabrications which successfully hid her move from Respondent and the court. (P.App. 152-154.) On August 24, 1992, Petitioner moved to Oregon with the children without informing their father, their guardian ad litem, or the court. Immediately upon her arrival in Oregon, Petitioner obtained an ex parte order, unsupported by the required Uniform Child Custody Jurisdiction Act ("UCCJA") affidavit, changing the terms of the Maine

order and giving her custody of the children. O.R.S. 109.790 et seq. (App. 9, 25.)

When Respondent learned of his children's removal from Maine, he applied in Maine for a temporary restraining order, writ of habeas corpus, and an order of contempt. On August 27, 1992, Justice Cleaves issued an ex parte temporary restraining order in aid of the August 17th custody order, awarding immediate sole custody of the children to Respondent, and setting the contempt and injunctive matters for further hearing and permanent decision. (P.App. 94.)

Based on these Maine orders, Respondent obtained a writ of assistance in Oregon,[4]

---

[4] Unlike Petitioner, Respondent filed the required UCCJA affidavit fully alerting the court of the contents of the Maine order and nature of the proceedings in Maine.

allowing him to retrieve his children. Respondent returned them to their home in Yarmouth, Maine, where he had rented an apartment. Respondent promptly informed Petitioner of his Yarmouth address, notwithstanding her contrary assertions.[5]

Petitioner filed various post-judgment motions seeking to vacate or reconsider the August orders. (P.App. 103, 132.) These were heard in September, along with Respondent's post-judgment enforcement motions regarding Petitioner's surreptitious removal of the children to Oregon. The trial court heard testimony from the guardian ad litem that the children were relieved to be with

---

[5] On August 28, 1993, the day Respondent returned from Oregon with the children, Petitioner's minister, Kenneth Baily, had already visited Respondent's home and investigated it, and reported back to Petitioner. (App. 15.)

their father in Yarmouth, Maine. The evidence demonstrated Respondent's ability to provide a wonderful home for his children, the damage the children suffered in his absence, and confirmed the wisdom of the court's August 17th decision. (P.App. 157-158.)[6]

After the trial justice's November 19, 1992 order denying Petitioner's motions and reaffirming, in detail, the decision to preserve the children's home in Yarmouth, Petitioner commenced an action in Oregon against Respondent and his Oregon attorney.

---

[6] The evidence is contrary to Petitioner's assertions in passim that Respondent's home was unsuitable. The record is devoid of any finding, comment, or reference that Respondent's home was unsuitable for his children; and, in fact, is replete with positive statements about his ability to provide a stable, nurturing, and adequate home. (P.App. 69, 70, 73, 77, 85, 87, 133, 143, 158.)

This involved a motion for sanctions for moving the children from Oregon to Maine in contravention of the illegal Oregon status quo order. (App. 9.)[7]

Petitioner filed an appeal to the Maine Supreme Judicial Court, and requested an "expedited briefing schedule" to accommodate her emotional distress. Attached to this motion were her and her husband's affidavits (P.App. 7, 23), which attempted to bring "facts" not in evidence before the appellate court. The Supreme Court denied her motion and struck the affidavits. (App. 1.) She filed the affidavits again with a motion to supplement the record. The court denied her second motion and again struck the affidavits. (App. 3.) These affidavits now

---

[7] Petitioner lost this case during the appeal proceedings. (App. 9.)

appear as pleadings in her appendix to this Court, despite their complete irrelevance to the proceedings below. Petitioner lost her appeal. She asked the Maine Supreme Judicial Court to reconsider; her motion was denied. (P.App. 53.) She then sought certiorari.

ARGUMENT

I. This Court Should Deny the Petition for Writ of Certiorari for Want of Jurisdiction

Petitioner premises jurisdiction on 28 U.S.C. § 1257(3), alleging denial of rights and privileges under the United States Constitution. This Court does not have certiorari jurisdiction if the federal questions were improperly presented or waived. Crowell v. Randell, 10 Pet. 368, 391 (1836); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434 (1940). If the state court fails

to pass upon the federal question, it is presumed these questions have been waived. Street v. New York, 394 U.S. 576, 582 (1969); and see Chicago, I. & L.R. Co. v. McGuire, 196 U.S. 128, 131-33 (1905); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Exxon Corp. v. Eagerton, 462 U.S. 176, 181 n. 3 (1983). Petitioner must rebut this presumption by specifying in her statement of the case:

> the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . .

Sup. Ct. R. 14.1(h).

The Supreme Judicial Court of Maine stated Petitioner did not properly present

or preserve the federal constitutional question[8]:

> Rowland also argues that the judgment violated her constitutional rights to travel and marital privacy. Because these arguments were not made before the trial court, they are not cognizable on appeal. Morris v. Resolution Trust Corp., 622 A.2d 708, 712, n. 2 (Me. 1993).

(P.App. 38.) Petitioner did not rebut the presumption that she waived her constitutional arguments. Her statement of facts does not reference where in the trial proceedings she raised her claimed federal questions, how she raised the federal issues, or how they were passed upon by the court. Petitioner states the issues were briefed before the appellate court, but she

---

[8] Maine's decisional law protects properly invoked constitutional claims. Osier v. Osier, 410 A.2d 1027 (Me. 1980); Jacobs v. Jacobs, 507 A.2d 596 (Me. 1986).

fails to state exactly how she timely articulated them before Judge Beaudoin's August 17th decision, or even his November 19th decision.[9] Thus, Petitioner failed to preserve her constitutional claims.

Even if Petitioner had not waived her constitutional claims, they are not sufficiently important to warrant this Court's review. The constitutional rights to which Petitioner refers, the right to travel and to marry, are important rights, but in this case they do not provoke constitutional analysis which might inform a greater public. Because custody cases are unique, fact-driven, and defined and molded by

---

[9] Part of Petitioner's argument references "motion material" which she claims raised her constitutional issues. (Petition, hereinafter "Pet.", 55.) To the contrary, these motion materials do not even cite to any specific constitutional provision, or contain the phrase "due process."

divergent state statutes bearing on the topic, this Court can make no formulation of universal guiding principles to assist in deciding child custody cases. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955); Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923).

One of the state court's duties in fact-driven relocation cases is to balance one parent's rights to move and marry against the other parent's countervailing rights to maintain, cultivate and mold a relationship with his or her children. Pierce v. Society of Sisters, 268 U.S. 510 (1924); Myer v. Nebraska, 262 U.S. 390 (1923); Franz v. United States, 70 F.2d 582, 595 (D.C. Cir. 1983). See Karst, Freedom of Intimate Association, 89 Yale L.J. 624, 627 (1980). The delicate balancing of compet-

ing interests in child custody disputes has long been the province of the state courts. As Chief Justice Rehnquist observed:

> If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

Santosky v. Kramer, 455 U.S. 745 (1982). The only way to parse the thicket of competing parental constitutional rights is to focus only on what is best for the children. Maine's statute requires this examination. Maine's courts did it.

Maine has a constitutionally neutral statute providing that, when both parents are Maine residents, the intended removal of children from the State of Maine permits review of the parental rights and respon-

sibilities "in the children's best interests."[10] This statute contains no presumptions favoring either the traveling parent or the remaining parent; no presumptions for or against physical custody in the mother or father; and no presumptions favoring continued primary "residence" with one parent. (P.App. 41.) Instead, the overall welfare of the children is examined using 13 statutory criteria to determine what is in the children's best interest. 19 M.R.S.A. § 752(5)(A)-(L). (App. 20.)

The court's November 19, 1992 order illustrates its careful review of all the evidence affecting the children's best interests, and a proper application of Maine's neutral statute. (P.App. 132-168.) Petitioner's unhappiness with the outcome of

---

[10] 19 M.R.S.A. § 752(12). (App. 23.)

the custody case has driven her attempt to exalt custodial claims into constitutional questions.

No doubt Petitioner is torn between staying in Maine to be near her children, and being in Oregon with her new husband. The Constitution, however, does not guarantee easy choices in life. There is nothing in Maine's "best interests" of the child statute which improperly burdens rights to marry, travel, and raise children. No order of a Maine court required Petitioner remain in Maine or that she not remarry. The court found on the particular facts of this case that the children would be better off remaining in Maine with their father than moving to Oregon with their mother. When Petitioner violated the terms of the court's order, the Maine court proceeded to enforce

its decision, after affording her a hearing to justify her conduct. There is no important constitutional question hidden in this custody dispute.

Petitioner would have this Court create and impose a presumption of continuing custody in the primary residential parent when that parent moves from state to state. There is no precedent to impose such a presumption in order to assure the moving parent of constitutional rights to travel and to remarry. This Court has already rejected application of presumptions in child custody cases.

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the

> important interests of both parent and child. It therefore cannot stand.

Stanley v. Illinois, 405 U.S. 645 (1972). (P.App. 41.) Like this Court, Maine also specifically rejects the use of presumptions in custody disputes. 19 M.R.S.A. § 752(12), overruling Villa v. Smith, 534 A.2d 4310 (1988). Jacobs, supra, at 599. Since presumptions are not useful in custody cases, no important federal question exists here.

Because Petitioner failed to preserve the federal constitutional questions, and because her "questions" lack importance to the general public, this Court has no certiorari jurisdiction and must deny the Petition.

II. The Maine Supreme Judicial Court Did Not Deny Petitioner Due Process or Infringe Her Other Constitutional Rights.

Petitioner argues that the court's November 1992 order prospectively revoked her custody if she moved to Oregon, without analysis of Respondent's specific living arrangements. She describes this as a "present determination of future rights."[11] (Pet. at 17.) This statement is incorrect. The court heard three days of testimony in August, and two days of testimony in September, 1992, bearing on the issue of each parent's suitability to provide a primary residence for the children. The guardian's report incorporated in the trial court's decision, concluded that Respondent was capable of providing a stable living

---

[11] This issue was never raised below.

arrangement for the children. Mortar and bricks were not the issue. The court found Respondent could provide the kind of nurturing environment which turns mortar and bricks into a home. (P.App. 70.) Thus, the court made a present decision on August 17, 1992, that Respondent was a fit custodial parent and that he would provide a suitable residence for the children. There was nothing prospective about the order.

Petitioner next argues that the orders deny due process because they impose a "crushing economic burden." Although one may assume that this litigation has been expensive for both parties, there is no evidence that these burdens have been "crushingly" severe in absolute or relative

terms.[12] Petitioner did not present this issue to the trial court or Maine's highest court.

Petitioner further argues that the August 27th and November 19th contempt orders denied due process because they were entered "without notice, hearing and an opportunity to comply." Petitioner launches her argument from an incorrect factual premise. She says:

> The language of the August 17 Order provides that after Petitioner moved to Oregon, Respondent Kingman would get custody if he moved to Yarmouth within a reasonable time. (Pet. at 24.)

---

[12] Petitioner again relies on her Affidavit and that of her husband, Arthur LaFrance, which the Maine Supreme Court specifically excluded from the record, twice. These affidavits are found at P.App. 7, 23.)

The order actually provided that the children remain in Maine with Respondent when Petitioner moved to Oregon. Only if Respondent did not thereafter move to Yarmouth, Maine, within a reasonable period time following Petitioner's move would the children then go to Oregon. (P.App. 90.)

Petitioner's rights were not "terminated in absentia." (Pet. at 24.) The order transferring custody to Respondent had been entered beforehand and after three full days of hearing. Consequently, Judge Cleaves' August 27th order was not a new custody order entered without hearing. It was a temporary restraining order issued to enforce a previous order, under the safeguards of rules protecting against demonstrated irreparable injury, and with the further safeguard that the entire matter be

heard fully within a few weeks. M.R. Civ. P. 65. (App. 25.)

Petitioner incorrectly charges that the court's August 27th order was punitive and denied her due process. Actually, the order awarding sole custody to Respondent was issued purely to enable him to retrieve the children from Oregon, and enforce the original decision. Maine courts have the power to enforce their decrees by appropriate methods; in this case, a temporary restraining order and an order to show cause. 19 M.R.S.A. § 752(12). (App. 23.) The September hearing was devoted to Petitioner's objections to the August orders, including whether she was in contempt of any order. Thus, Petitioner was afforded the full opportunity, notice, and hearing which she falsely complains was denied her. Moreover,

the November 19th decision restored shared parental rights to Petitioner, leaving no lasting effect to the August 27th enforcement order.

Petitioner also claims that the Maine trial court's finding of contempt is not moot. Whether or not the contempt order against Petitioner, affirmed by the Maine Supreme Judicial Court,[13] is moot does not present an issue of federal constitutional law.

CONCLUSION

Petitioner presents no important question of constitutional law, and there is no terrible injustice that Maine courts have failed to perceive and correct. Petitioner fully presented her case to move across the

---

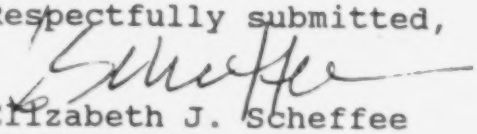
[13] See discussion in the Maine Supreme Court's decision at P.App. 48-49.

country with the Kingman children to the Maine trial court. She lost. Petitioner fully litigated her position regarding the August 28th enforcement order and her claim that she did not understand the August 17th order. She lost. Petitioner litigated, in Oregon, her complaints about Respondent retrieving his children and returning them to Maine. She lost. Petitioner filed an appeal of the trial court's decision and four procedural motions with the Maine Supreme Judicial Court. She lost all of them.

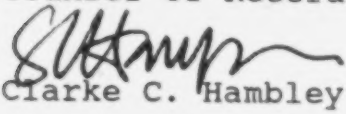
Petitioner is unhappy, litigious, and determined to have her way in this case, even if her way is not judicially sanctioned as being in the best interests of the Kingman children. This Court should deny her Petition for Writ of Certiorari knowing that

the Maine courts have afforded the parties all of their constitutional rights, have indulged no presumption in favor or one party over the other, have seen through sham testimony and selfishness, and have done what was in the children's best interests.

Respectfully submitted,



Elizabeth J. Scheffee
Counsel of Record



Clarke C. Hambley

GIVERTZ, LUNT, HAMBLEY
& SCHEFFEE
10 Moulton Street
P.O. Box 4801
Portland, ME 04112-4801
(207) 772-8373
Counsel for Respondent

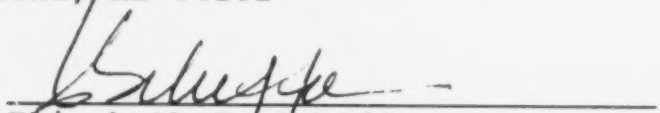
Dated: December 22, 1993

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Opposition and its Appendix have been served by mailing, postage prepaid, first class, on December 22, 1993, to counsel of record as follows:

Carl R. Neil, Esq.
Lindsay, Hart, Neil & Weigler
222 S.W. Columbia Street
Suite 1600
Portland, OR 97201

E. Stephen Murray, Esq.
Murray, Plumb & Murray
75 Pearl Street
Portland, ME 04101



Elizabeth J. Scheffee
Counsel for Respondent

GIVERTZ, LUNT, HAMBLEY & SCHEFFEE
10 Moulton Street, P.O. Box 4801
Portland, Maine 04112-4801
(207) 772-8373

(5)

Supreme Court, U.S.
FILED
DEC 22 1993
OFFICE OF THE CLERK

NO. 93-853

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT

On Petition for Writ of Certiorari
to the Supreme Court of Maine

APPENDIX OF RESPONDENT

COUNSEL FOR RESPONDENT
ROBERT E. KINGMAN

ELIZABETH J. SCHEFFEE
Counsel of Record
CLARKE C. HAMBLEY
GIVERTZ, LUNT, HAMBLEY & SCHEFFEE
10 MOULTON STREET, P.O. BOX 4801
PORTLAND, MAINE 04112-4801
(207) 772-8373

BEST AVAILABLE COPY

37 pp

TABLE OF CONTENTS

Maine Order dated March 12, 1993 . . . 1

Maine Order dated March 18, 1993 . . . 3

Oregon Temporary Protective Order of Restraint 4

Oregon Judgment on the Pleadings . . . 9

Letter from Art LaFrance to Judge Beaudoin August 29, 1992 . . . 15

19 M.R.S.A. § 752(2) 17

19 M.R.S.A. § 752(5) 20

19 M.R.S.A. § 752(12) 23

O.R.S. 109.790 25

M.R. Civ. P. 65 28

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Cum-92-525

MARGARET S. ROWLAND

vs.

ROBERT E. KINGMAN

ORDER

Upon motion of appellee to vacate this Court's Order of March 4, 1993, and for other relief,

It is ORDERED that the motion be, and it hereby is, GRANTED in part. The time within which the appellee must file his brief is hereby enlarged to April 15, 1993. Appellee may file a reply brief on or before April 22, 1993. Oral argument will be scheduled for May 13, 1993.

The affidavits filed in support of appellant's motion for expedited appeal are

not part of the record on appeal as defined by M.R. Civ. P. 74(a).

In all other respects, appellee's motion is hereby DENIED.

Dated: March 12, 1993

For the Court,

/s/ David G. Roberts
Associate Justice

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Cum-92-525

MARGARET S. ROWLAND

vs.

ROBERT E. KINGMAN

ORDER

Upon motion of appellant for leave to supplement the record,

It is ORDERED that the motion be, and it hereby is, DENIED.

Dated: March 18, 1993

For the Court,

/s/ David G. Roberts
Associate Justice

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Department of Domestic Relations

In the Matter of the Marriage of MARGARET S. ROWLAND, Petitioner, and ROBERT E. KINGMAN, Respondent.	No. 9208-66808 TEMPORARY PROTECTIVE ORDER OF RESTRAINT

THIS PROTECTIVE ORDER AFFECTS THE FOLLOWING CHILDREN:

Full Names	Dates of Birth	Residence Address
Edwin R. Kingman	January 13, 1983	7 Scarborough Drive Lake Oswego, OR 97035
Meagan R. Kingman	April 17, 1985	7 Scarborough Drive Lake Oswego, OR 97035

UNTIL CUSTODY OR VISITATION IS DETERMINED BY MEDIATION OR UNTIL FURTHER ORDER OF

THE COURT, each parent is restrained and enjoined from interfering with the children's usual place of residence, from interfering with the present placement and daily schedule of the children, from hiding or secreting the children from either parent, from interfering with each parent's usual contact and visitation with the children, from leaving the State of Oregon with the children without the written permission of the other parent or the permission of the Court, or from in any manner disturbing the current schedule and daily routine of the children.

DATED this 27 day of August, 1992.

/s/ Kathleen B. Nacktegill
CIRCUIT COURT JUDGE

SEAL CERTIFIED TO BE A TRUE COPY
OF THE ORIGINAL

Dated 8/27/92

NOTICE TO PARENTS MAKING THIS MOTION: The Court also requires you to GIVE NOTICE TO THE OTHER PARENT. See back for details.)

NOTICE

Do not sign until you are in the presence of a Notary Public.)

PERSONAL NOTICE (the Mother, or the Father, or any other adult may give the copy to the other parent, and should then complete the section below.)

I, _____, hereby swear that I gave an exact and true copy of this Temporary Protective Order of Restraint to the other parent, _____, who is the (mother)(father), by personally handing it to her/him.

DATE GIVEN TO OTHER PARENT: _____

Signed: _____
(Sign only before a Notary Public)

MAIL NOTICE (the Mother, or the Father, or any other adult may mail the copy to the other parent, and should then complete the section below.)

I, Kathryn S. Augustsin, hereby swear that I could not personally hand a copy of this Temporary Protective Order of Restraint to the other parent, so I mailed a true, exact and full copy of it to him/her as follows:

DATE MAILED: 8/27/92 TIME: 2:16 p.m.

MAILED AT: Portland, Oregon
(City, State)

I mailed it to the other parent's last known mailing address, which is:

RFD #3, Box 5540
Street

Winslow, Maine 04901
City State Zip

Signed: Kathryn S. Augustsin
(Sign only before a Notary Public)

SUBSCRIBED AND SWORN TO before me this ___ day of _____, 1992.

_____
NOTARY PUBLIC FOR OREGON
My commission expires: ____

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

In the Matter of the Marriage of:	)	No. 9208-66808
MARGARET S. ROWLAND, Petitioner,	)	JUDGMENT ON THE PLEADINGS
and	)	
ROBERT E. KINGMAN, Respondent.	)	

Alleged contemnors Susana Alba and the firm of Hoevet, Snyder & Miller's Motion for Judgment on the Pleadings came before this court for hearing on or about March 3,1 993. Petitioner's counsel, Carl Neil, of attorneys for petitioner, was present; respondent's counsel, Beth Mason, of attorneys for respondent, was present, together with alleged contemnor Susana Alba. The court

considered all of the pleadings in the file, together with all attached exhibits, memorandums of law filed on behalf of all interested parties, and oral argument by counsel on behalf of petitioner and the alleged contemnors Susana Alba and the firm of Hoevet, Snyder & Miller, and the court being fully advised;

THE COURT FINDS:

1. Oregon has adopted the Uniform Child Custody and Jurisdiction Act, ORS 109.700 et seq, and recognizes that the Parental Kidnapping Prevention Act further controls the modification of custody orders from different states, involving the same children.

2. The Temporary Protective Order of Restraint entered in this matter is a "custody order" as contemplated by the Uniform

Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.

2. The Temporary Protective Order of Restraint did not enforce the Maine Order which preceded it, but rather modified the Maine Order.

3. Pursuant to the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, Oregon had no jurisdiction to enter the Temporary Protective Order of Restraint while Maine was actively exercising proper jurisdiction over the children of these parties.

4. The pleadings filed herein on behalf of petitioner fail to state a claim on which relief can be granted.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED & DECREED that alleged contemnors Susana Alba and the firm of Hoevet, Snyder

& Miller's Motion for Judgment on the Pleadings, be and hereby is allowed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment shall enter against petitioner and in favor of the alleged contemnors Susana Alba and the firm of Hoevet, Snyder & Miller; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the alleged contemnors Susana Alba and the firm of Hoevet, Snyder & Miller are hereby awarded a judgment against petitioner as and for attorney's fees in the sum of $ 22,797.00 , and costs and disbursements as the prevailing party in the sum of $ 232.50 .

MONEY JUDGMENT

1. JUDGMENT CREDITOR: SUSAN ALBA /and/ the firm of HOEVET, SNYDER & MILLER

2. JUDGMENT CREDITOR'S ATTORNEY: BETH MASON

3. JUDGMENT DEBTOR: MARGARET S. ROWLAND

4. AMOUNT OF THE JUDGMENT: SEE BELOW

5. INTEREST OWED TO DATE OF JUDGMENT: NONE

6. POST-JUDGMENT INTEREST/ACCRUAL INFORMATION:

   (A) RATE OF INTEREST: 9%

   (B) BALANCE UPON WHICH INTEREST ACCRUES: UNPAID BALANCE

   (C) DATE FROM WHICH INTEREST RUNS:

   (D) INTEREST TYPE: SIMPLE ANNUAL

7. JUDGMENT AWARDS:

   (A) COSTS/DISBURSEMENTS: $ 232.50

   (B) ATTORNEYS FEES: $ 22,797.00

DATED this 8 day of June, 1993.

/s/
JUDGE STEPHEN B. HERRELL

Submitted by:
BETH MASON OSB#77269
Of Attorneys for alleged
contemnors Susan Alba and
the firm of Hoevet, Snyder
& Miller

LEWIS & CLARK
NORTHWESTERN SCHOOL OF LAW

Aug 29

Dear Judge Beaudoin--

The original of this went surface mail yesterday and so may be delayed. I am sending this ahead in the hope that it may be helpful on Monday.

On the original, I noted that as of Friday at 7:00 PM, according to Doctor Rowland's minister, Mr. Kingman still did not have a residence in Yarmouth, as required by your order. The address of 160A Main Street was unfurnished, being a two level apartment, partly over a garage, opposite a hardware store.

You have my best wishes on this case. Monday, I will be resuming my school and

court responsibilities here in Oregon, but my thoughts will be with you.

Art LaFrance

19 M.R.S.A. § 752(2)

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Allocated parental rights and responsibilities" means that responsibilities for the various aspects of a child's welfare are divided between the parents, with the parent allocated a particular responsibility having the right to control that aspect of the child's welfare. Responsibilities may be divided exclusively or proportionately. Aspects of a child's welfare for which responsibility may be divided include primary physical residence,

parent-child contact, support, education, medical and dental care, religious upbringing, travel boundaries and expenses and any other aspect of parental rights and responsibilities. A parent allocated responsibility for a certain aspect of a child's welfare may be required to inform the other parent of major changes in that aspect.

***

C. "Shared parental rights and responsibilities means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibili-

ties and both parents must confer and make joint decisions regarding the child's welfare.

19 M.R.S.A. § 752(5)

5. Best interest of the child. The court, in making an award of parental rights and responsibilities with respect to a minor child, shall apply the standard of the best interest of the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements

and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community.

H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;

I. The capacity of each parent to cooperate or to learn to cooperate in child care;

J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;

K. The effect on the child if one parent has sole authority over the child's upbringing;

K-1. The existence of a history of domestic abuse between the parents; and

L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

19 M.R.S.A. § 752(12)

12. Modification of orders; compulsory process. Upon the motion of one or both of the parents, or any agency or person who has been granted parental rights and responsibilities or contact with respect to a child under this section, the court may alter its order concerning parental rights and responsibilities or contact with respect to a minor child as circumstances require. Child support orders may be modified retroactively, but only from the date that notice of a petition for modification has been served upon the opposing party pursuant to the Maine Rules of Civil Procedure. The parties shall be referred to mediation as under subsection 4.

The relocation, or intended relocation, of a child resident in this State to another

state by a parent, when the other parent is a resident in this State and there exists an award of shared or allocated parental rights and responsibilities concerning the child, is a substantial change in circumstances.

In execution of the powers given it under this Title, the court may employ any compulsory process which it deems proper, by execution attachment or other effectual form, on which costs shall be taxed as in other actions.

O.R.S. 109.790

109.790. Information required.

(1) Every party in a custody proceeding inn the first pleading of the party or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during the period. In this pleading or affidavit every party shall further declare under oath whether:

(a) The party has participated, as a party, witness or in any other capacity, in any other litigation concerning the custody of the same child in this or any other state;

(b) The party has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(c) The party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(2) If the declaration as to any of the above items is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's

jurisdiction and the disposition of the case.

(3) Each party has a continuing duty to inform the court of any custody proceedings concerning the child in this or any other state of which the party obtained information during this proceeding.

MAINE RULES OF CIVIL PROCEDURE

RULE 65. INJUNCTIONS

(a) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon

the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry as the court fixes, unless within the time so fixed the order, for good cause shown is extended or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is

granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice tot he party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event eh court shall proceed to hear and determine such motion as

expeditiously as the ends of justice require.

(b) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party. T he application for preliminary injunction may be included in the complaint or may be made by motion.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of

the record on the trial and need not be repeated upon the trial. This subdivision (b)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, provided, however, that for good cause shown and recited in the order, the court may waive the giving of security.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent

upon whom any papers affecting the surety's liability ont he bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) Form and Scope of Restraining Order or Injunction. Every restraining order and every order granting a preliminary or permanent injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only

upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee. These rules do not modify any statute relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee.

(f) Presentation to Other Justice or Judge. When an application for an injunction or for an order or decree under this rule ins made to one justice or judge and has been acted upon by that justice or judge, it shall not be presented to any other justice or judge except by consent of

the first justice or judge which may be oral.